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A GUIDE TO UNINSURED MOTORIST INSURANCE LAW IN MISSISSIPPI

*Richard T. Phillips**

INTRODUCTION

This article compiles and examines the Mississippi law regarding uninsured motorist insurance. Since its enactment in 1966, the Mississippi Uninsured Motorist Act[1] has afforded a means of financial recovery for thousands of Mississippians injured by financially irresponsible motorists. In the sixteen years since the Act's enactment, a substantial body of law concerning uninsured motorist insurance has developed. To date, however, there has been no concise overview of the Act, of its interpretation by the courts, and of its operation in actual practice.[2] This article is written to fill that void. It is offered as an aid to the practitioner, as a starting point for more detailed research of specific questions, and as a guide to the Mississippi law of uninsured motorist insurance.

The thesis of this article is twofold. First, uninsured motorist law in Mississippi is an example of the successful interworkings of the legislature, the insurance industry, the courts, and advocates representing injured Mississippians for the benefit of the citizens of this state. The legislature enacted the Mississippi Uninsured Motorist Act with the assistance and cooperation of the insurance industry.[3] Since the Act's passage, plaintiffs' advo-

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[1] Uninsured Motorist Act, ch. 524, 1966 Miss. Laws 978 (codified as amended at MISS. CODE ANN. §§ 83-11-101 to -111 (1972 & Supp. 1981)).

[2] For discussions of specific aspects of uninsured motorist law, see *1980 Mississippi Supreme Court Review*, 51 MISS. L. J. 505, 509-14 (1980-1981) (discussion of scope of "per person" limitation clauses in uninsured motorist insurance policies); *1979 Mississippi Supreme Court Review*, 50 MISS. L. J. 813, 822-28 (1979) (discussion of aggregation of claims).

[3] *See, e.g.*, Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 436 n.5 (N.D. Miss.) (act largely a product of insurance industry), *aff'd mem. per curiam*, 539 F.2d 574

cates have vigorously asserted the rights of injured persons covered by uninsured motorist insurance. Following a tradition of protecting the injured individual, the courts of Mississippi have interpreted the Act to provide broad protection for persons injured by financially irresponsible motorists. The cumulative effect of these efforts has been to provide a means of recovery to thousands of Mississippians who, in the absence of uninsured motorist insurance, would have obtained no compensation for their injuries.

Regarding the second aspect of its thesis, this article seeks to serve a specific purpose. There may be more unasserted claims in the field of uninsured motorist insurance than in any other area of insurance law. One reason for this situation is a lack of knowledge and understanding by the public of the existence and application of uninsured motorist insurance. Another factor contributing to the number of missed claims is the frequent failure of practitioners to recognize potential claims. This article seeks to point out the areas in which uninsured motorist claims are frequently overlooked. It is hoped that this article and its review of the application of uninsured motorist insurance in Mississippi may help the practitioner identify legitimate, but sometimes obscure, uninsured motorist claims. In this manner, this article seeks to advance the purpose served by uninsured motorist insurance.

I. Background and Purpose

The purpose of uninsured motorist insurance is to "provide protection to innocent insured motorists and passengers injured as a result of the negligence of financially irresponsible drivers."[4] Uninsured motorist insurance was conceived to fill the gap left by the operation of motor vehicle financial responsibility laws and is intended, within the limits of its coverage, to afford financial recompense to those injured solely through the negligence of motorists who, because they are uninsured or financially irresponsible, cannot satisfy adverse judgments.

(5th Cir. 1976); Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 431-32 (Miss. 1973) (uninsured motorist coverage evolved at behest of insurance companies).

[4] Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 432 (Miss. 1973).

Uninsured motorist insurance is exclusively a creature of the twentieth century. America experienced a phenomenal increase in the number and use of automobiles during the first half of this century, and, by 1950, what had been a novelty—the horseless carriage—had become an integral part of American life. The increased use of the automobile was accompanied by a proportionate increase in accidents and injuries. Motor vehicle liability insurance arose as a method of helping to compensate the innocent victims of motorists' negligence. Liability insurance guaranteed a solvent fund from which the innocent injured party could be compensated.

Unfortunately, many accidents involved uninsured or otherwise financially irresponsible motorists. It was this situation that gave rise to financial responsibility laws throughout the United States. Connecticut enacted the first financial responsibility law in 1925.[5] Since that time, every state has enacted some type of legislation to ensure the financial responsibility of motorists.[6] In 1952, the Mississippi Legislature enacted the Mississippi Motor Vehicle Safety-Responsibility Act.[7]

The Mississippi Motor Vehicle Safety-Responsibility Act requires a motorist to produce evidence of financial responsibility once an accident has occurred. The framers of the Safety-Responsibility Act undoubtedly anticipated that its provisions would lead to a general public acceptance of the necessity for voluntary automobile liability insurance. The problem with the Mississippi Act, as with most financial responsibility laws, is that it does not operate until after an accident has occurred. While the law serves as an incentive to encourage the purchase of insurance, it offers no relief to the innocent victim who is injured by an irresponsible motorist. The "one free accident" as-

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[5] Financial Responsibility Law, ch. 183, 1925 Conn. Pub. Acts 3956 (repealed 1927) (current version at CONN. GEN. STAT. ANN. § 14-112 (West 1970 & Supp. 1982)).

[6] *See* Motor Vehicle Safety-Responsibility Act, No. 704, § 43, 1951 Ala. Acts 1224 (codified at ALA. CODE §§ 32-7-1 to -42 (1975)) (state financial responsibility law); Motor Vehicle Safety-Responsibility and Driver Improvement Act, ch. 159, § 42, 1947 Ind. Acts 491 (codified as amended at IND. CODE ANN. §§ 9-2-1-1 to -45 (1980 & Supp. 1981)) (same); Motor Vehicle Safety Responsibility Act, ch. 178, 1949 Nebr. Laws 482 (codified as amended at NEB. REV. STAT. §§ 60-501 to -568 (1978 & Supp. 1981)) (same).

[7] Motor Vehicle Safety-Responsibility Law, ch. 359, 1952 Miss. Laws 512 (codified as amended at MISS. CODE ANN. §§ 63-15-1 to -75 (1972 & Supp. 1981)).

pect of the financial responsibility laws gives rise to problems, for instance, where the negligent motorist simply violates the law by having no policy in existence, where coverage is denied under an existing policy by reason of exclusions or policy breaches, or where the tortfeasor is an unidentified hit-and-run motorist. The financial responsibility laws offer no assistance to the innocent victim in these three situations.

When the above problems were recognized, a number of states enacted public "unsatisfied judgment funds," which provide payment in a limited amount to persons who hold unsatisfied judgments against negligent motorists.[8] Insurance companies adopted the concept of uninsured motorist insurance as an "alternative to publicly administered judgment-funds and compulsory insurance programs."[9]

In 1957, New Hampshire enacted the first legislation requiring automobile liability insurance carriers to offer uninsured motorist coverage as a supplement to every automobile liability policy.[10] Since that time, every state has followed by enacting legislation requiring uninsured motorist coverage as either a mandatory or an optional addition to automobile liability policies.[11]

The legislature enacted the Mississippi Uninsured Motorist Act in 1966.[12] The Act requires each automobile liability insurance policy to carry an uninsured motorist endorsement that provides coverage in limits no less than those set forth in the Safety-Responsibility Act, unless such endorsement is specifi-

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[8] *See* Act of April 26, 1972, ch. 73, § 1, Md. Laws 281 (codified as amended at MD. ANN. CODE art. 48A, §§ 243-243L (1979 & Supp. 1981)) (creating state automobile insurance fund); Unsatisfied Claim and Judgment Fund Law, ch. 174, 1952 N.J. Laws 570 (codified as amended at N.J. STAT. ANN. §§ 39:6-61 to :6-91 (West 1973 & Supp. 1981)) (same).

[9] Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 432 (Miss. 1973).

[10] Act of August 2, 1957, ch. 305, § 305:8, 1957 N.H. Laws 386 (codified at N.H. REV. STAT. ANN. § 268:15-15a (1977)).

[11] *See* Note, *Insurer Intervention in Uninsured Motorist Cases*, 55 IND. L.J. 717, 717 n.1 (1980) (recent compilation of state uninsured motorist statutes). *See generally* 2 R. LONG, THE LAW OF LIABILITY INSURANCE 24-205 app. A (1979) (comparison of state uninsured motorist statutes).

[12] Uninsured Motorist Act, ch. 524, 1966 Miss. Laws 978 (codified as amended at MISS. CODE ANN. §§ 83-11-101 to -111 (1972 & Supp. 1981)).

cally rejected in writing.[13] Since uninsured motorist provisions are mandatory, the statutory requirements override contrary terms in the policies themselves.[14]

II. Construction of the Act

Because of the similarity of many states' uninsured motorist statutes, courts often look to decisions of other states when faced with issues of first impression regarding uninsured motorist law.[15] Previous Mississippi decisions in other fields of insurance law also provide a source of direction in considering novel uninsured motorist questions.[16] A study of the Mississippi cases reveals that three rules of construction generally control in interpreting the provisions of the Mississippi Uninsured Motorist Act and the policies of insurance issued thereunder:

(1) Because the Act is remedial in nature, its provisions are liberally construed to accomplish the purpose of providing recompense to the injured party;[17]
(2) Where policy provisions are ambiguous, they are construed against the insurer and in favor of the in-

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[13] Miss. Code Ann. § 83-11-101(2) (Supp. 1981).

[14] The wording of a standard uninsured motorist policy is exemplified by the USF&G Companies' 1980 Personal Auto Policy, which is commonly issued in Mississippi:

> [The insurance company] will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of:
>
> 1. Bodily injury sustained by a **covered person** and caused by an accident; and
> 2. **Property damage** caused by an accident.
>
> The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the **uninsured motor vehicle.**

The USF&G Companies, Personal Auto Policy (1980) (pt. C replacement).

[15] *See* Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 272 (Miss. 1979) (declined to follow Missouri and Florida courts that distinguished betweeen "legal" representative and "personal" representative); Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1380-81 (Miss. 1977) (relied on Alabama decision in construing limits of liability clause in insurance policy).

[16] *See* Aetna Casualty & Sur. Co. v. Head, 240 So. 2d 280, 282 (Miss. 1970) (cited previous decision construing physical contact requirement in policy covering building to interpret physical contact requirement in hit-and-run vehicle portion of uninsured motorists policy).

[17] *See infra* notes 20-25 and accompanying text.

jured party;[18] and

(3) Where provisions of the policy conflict with those of the statute, the statute controls.[19]

A. Liberal Construction

The Mississippi Uninsured Motorist Act, like the Safety-Responsibility Act, indicates the legislative policy of protecting the public and providing insurance coverage when citizens of the state are injured on the highways.[20] The Mississippi Supreme Court has concluded that "[t]he insurance business is affected with a public interest and is regarded generally as quasi-public in character."[21] Because of the humanitarian aims of the Mississippi Uninsured Motorist Act and the public policy of protecting those injured by negligent drivers, the provisions of the Act are liberally construed in favor of the injured party.[22]

The Mississippi Supreme Court has determined that the purpose of the Act is to provide "the uninsured a means of collecting that to which he is legally entitled for bodily injuries caused by accident arising out of the ownership, maintenance and use of an uninsured automobile."[23] The supreme court has also emphasized the liberal construction to be given to the provisions of the Uninsured Motorist Act in favor of the injured party and has stated that when an insurer draws a provision in compliance with the statutory requirements of uninsured motorist coverage, that provision should further the public policy of benefitting persons injured on state highways.[24] Additionally, the court has indicated that in order to effect this purpose, persons injured by an uninsured motorist should receive the same pro-

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[18] *See infra* notes 26-27 and accompanying text.

[19] *See infra* notes 28-48 and accompanying text.

[20] Parker v. Cotton Belt Ins. Co., 314 So. 2d 342, 344 (Miss. 1975).

[21] Travelers Indem. Co. v. Watkins, 209 So. 2d 630, 632 (Miss. 1968).

[22] *See, e.g.*, Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 437 (N.D. Miss.) (liberal construction maximizes humanitarian purpose), *aff'd mem. per curiam*, 539 F. 2d 574 (5th Cir. 1976); Parker v. Cotton Belt Ins. Co., 314 So. 2d 342, 344 (Miss. 1975) (statute's remedial nature compels broad interpretation).

[23] Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969) (per curiam).

[24] Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 433-34 (Miss. 1973).

tection as that offered by a standard liability insurance policy.[25]

B. Ambiguous Policy Provisions

It is an established rule of construction in insurance law that where a policy's provisions are ambiguous, they are construed against the insurance company preparing the provisions, and any fair doubt is resolved in favor of the insured.[26] This rule applies in uninsured motorist cases and has allowed the "stacking" of the uninsured motorist coverage of multiple vehicles within a single policy.[27]

C. Conflict with the Statute

From a practical aspect, a most important rule of construction concerning uninsured motorist coverage regards any conflict between the insurance policy and the Act. It is clear that while the policy may expand the coverage required by the statute, it cannot reduce such coverage, and any policy provisions attempting to reduce the coverage required by statute are void.[28]

In all insurance policies issued after the effective date of the Act, the provisions of the statute are written into the contract of insurance by operation of law.[29] This rule of construction allows the stacking, or aggregation of policy limits, in spite of specific

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[25] *Id.* at 432 (quoting Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W. 2d 133, 136-37 (1968)).

[26] *See, e.g.*, Oliver v. United States Fidelity & Guar. Co., 309 So. 2d 237, 238 (Fla. Dist. Ct. App.) (ambiguous language construed against insurer to provide wider coverage), *cert. denied*, 322 So. 2d 913 (1975); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805, 810 (Miss. 1970) (where policy provision is subject to two equally reasonable interpretations, the one allowing greater indemnity prevails).

[27] *See, e.g.*, St. Arnaud v. Allstate Ins. Co., 501 F. Supp. 192, 194 (S.D. Miss. 1980) (ambiguous limits of liability clause allowed stacking of uninsured motorist coverage); Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 270 (Miss. 1979) (same); Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977) (same); *see also infra* notes 181-90 and accompanying text (stacking discussion).

[28] *See, e.g.*, Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 769, 777-78 (Miss. 1973) (policy provision excluding injured from coverage held violative of policy of uninsured motorist statute); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 459 (Miss. 1971) (policy provision may not restrict source of funds to which insured is legally entitled by requiring written consent before settlement by insured).

[29] United States Fidelity & Guar. Co. v. Gough, 289 So. 2d 925, 927 (Miss. 1974).

provisions in a policy to the contrary.[30] This rule also allows an injured party to collect uninsured motorist insurance for the negligence of one tortfeasor after settling with another.[31] This rule of construction guarantees an injured party the right to civil proceedings for adjudication of his claim notwithstanding policy provisions requiring arbitration.[32] It also prevents the narrowing of the class of protected persons or "insureds"[33] and prevents the reduction of the statutorily required minimum coverage by payments for medical coverage, thus allowing the injured party to collect both uninsured motorist coverage and medical coverage under the policy despite policy provisions to the contrary.[34]

This rule of construction is of immense practical importance. In interpreting a policy of uninsured motorist insurance, the practitioner must look first to the terms of the policy, then to the Act. Although coverage may be expressly denied in the policy, it is still provided if required by the Act. For example, in *Lowery v. State Farm Mutual Automobile Insurance Co.*,[35] the son of the named insured owned a motorcycle that was not listed in the insured's policy. While riding the motorcycle, the son was struck by an uninsured motorist.[36] Since the terms of the policy clearly excluded the son from coverage, the question that evolved in the case was whether the terms of the policy con-

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[30] *E.g.*, Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971) (insured entitled to recover under two insurance policies despite contrary policy provision).

[31] *E.g.*, *id.* at 459-60 (insured not precluded from recovering on uninsured motorist coverage despite settlement with tortfeasor in contravention of uninsured motorist insurance policy).

[32] *See* Logan v. Aetna Casualty & Sur. Co., 309 F. Supp. 402, 403, 405 (S.D. Miss. 1970) (policy provision requiring arbitration held unenforceable); *see also* MISS. CODE ANN. § 83-11-109 (1972) (prohibiting arbitration provisions in uninsured motorist policies).

[33] *See, e.g.*, Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 439 (N.D. Miss.) (insurer's attempt to exclude from insurance protection persons who were statutorily covered held ineffectual), *aff'd mem. per curiam*, 539 F. 2d 574 (5th Cir. 1976); Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701 (Miss. 1974) (insurance policy may not restrict coverage to exclude persons otherwise allowed by Act to recover).

[34] *See* Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 703 (Miss. 1974) (insurance company's attempt to limit liability under uninsured motorist coverage by amount paid under medical coverage held violative of statutory requirements).

[35] 285 So. 2d 767 (Miss. 1973).

[36] *Id.* at 768.

flicted with the requirements of the Act. The court held that such a conflict existed and that coverage was afforded in spite of the express exclusionary language of the policy.[37]

The *Lowery* court quoted the earlier decision of *Rampy v. State Farm Mutual Automobile Insurance Co.*,[38] concerning the statute's policy to provide protection for persons injured by financially irresponsible motorists. The *Lowery* court balanced this public policy against the exclusionary clause in the insurance contract. The court reiterated another court's holding that if restrictive language in an insurance policy defeats the purpose and intent of the statute, it contravenes public policy and must be considered "nugatory and void."[39]

In *Harthcock v. State Farm Mutual Automobile Insurance Co.*,[40] a landmark case, the Mississippi Supreme Court faced several questions of first impression regarding uninsured motorist coverage. One question was whether an "other insurance" provision in an uninsured motorist policy was effective to relieve the uninsured motorist carrier from liability.[41] The court held that such a provision violated the Act and that any provision that attempts to reduce the coverage afforded by the Act is void.[42]

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[37] *Id.* at 769, 777-78.

[38] 278 So. 2d 428 (Miss. 1973).

[39] 285 So. 2d at 770 (quoting Travelers Indem. Co. v. Powell, 206 So. 2d 244, 246 (Fla. Dist. Ct. App. 1968)).

[40] 248 So. 2d 456 (Miss. 1971).

[41] An example of an "other insurance" provision states:

> If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

The USF&G Companies, Personal Auto Policy 2 (1980) (pt. C replacement).

One court has stated that "[t]his type of uninsured motorist coverage is termed 'excess,' because it applies only to the extent that its limits exceed the limits of any *other* uninsured motorist insurance proceeds available to the occupant-insured." Walton v. State Farm Mut. Auto. Ins. Co., 55 Hawaii 326, 518 P.2d 1399, 1400 (1974).

[42] 248 So. 2d at 459-60. The court emphasized that the Act mandated the coverage afforded by the policies and that the coverage could not be restricted or weakened by the exclusionary clause. *Id.* at 459; *see also* Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 439 (N.D. Miss.) (insurance company's obligations to insured fixed by statute and could not be circumvented by policy provisions), *aff'd mem. per curiam*, 539 F.2d 574 (5th Cir. 1976).

While the requirements of the Act may not be reduced by the insurance policy, the coverage may be expanded.[43] For example, in *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.*,[44] a policy that provided "insurance against uninsured motorists" with no words of limitation as to the type of damages recoverable was held to provide recovery for loss of income, as well as for bodily injury or death, as required by the Act.[45] In *Pearthree v. Hartford Accident & Indemnity Co.*,[46] the court decided whether the daughter of the decedent came within the definition of an "insured" to whom recovery was available. The court noted that the insurance company in the *Pearthree* policy had chosen to define "insured" more broadly than it is defined in the Act.[47] Reasoning that the company should not be permitted to benefit from the narrower definition employed by the Act, the court held that the daughter was an insured.[48]

Thus, the third rule of construction interpreting uninsured motorist policies is that while the coverage mandated by the Act may be expanded, it may not be restricted by the terms of the policy. Therefore, the practitioner faced with a question of uninsured motorist coverage must study both the insurance policy and the Act. Although the policy contains specific exclusions, coverage may nevertheless be required by the Act. On the other hand, where the Act does not mandate coverage, the broad provisions of the policy may provide coverage beyond the minimum

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[43] *See* Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701 (Miss. 1974) (parties may contract freely as to uninsured motorist coverage provided the statutory requirements are not diluted).

[44] 582 F.2d 984 (5th Cir. 1978).

[45] *Id.* at 988-89, 989 n.9. The Fifth Circuit summarized Mississippi law:

> The Mississippi Supreme Court . . . has made clear that the statute simply "requires each policy to provide the minimum coverage," . . . and that an insurer and an insured are "free to contract as to uninsured motorist coverage *in any respect* so long as the required coverage is not cut down by the policy provisions."

Id. at 989 (citing Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d at 462, and Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701 (Miss. 1974)).

[46] 373 So. 2d 267 (Miss. 1979).

[47] *Id.* at 271.

[48] *Id.* This case was again before the Mississippi Supreme Court in United States Fidelity & Guar. Co. v. Pearthree, 389 So. 2d 109 (Miss. 1980). *See infra* notes 146-60 and accompanying text.

requirements of the Act. In either case, the policy and the Act must be read in the light of the first two rules of construction of uninsured motorist policies, which are that both the Act and the policy are to be liberally interpreted in favor of the injured party and that any ambiguities in the uninsured motorist policy are to be resolved in favor of the injured party, for whose benefit uninsured motorist insurance is provided.

III. Scope of Coverage

A. The Definition of "Insured"

The Mississippi Uninsured Motorist Act requires each policy of liability insurance to include an uninsured motorist endorsement "undertaking to pay *the insured* all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle."[49] The scope of the protection afforded by the Act is determined to a great extent by the definition of the term "insured." Because the Act is liberally construed, the term is much broader than what first glance might indicate. It is here that practitioners often miss potential uninsured motorist claims. As a result, many lawful recoveries go uncollected.

Two classes of "insureds" are created by the Mississippi Act,[50] and the scope of uninsured motorist coverage is different as to each class. The first class of persons includes "the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either."[51] The Act affords coverage to this first class of persons while they are "in a motor vehicle or otherwise."[52] The second class of insureds includes "any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the pol-

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[49] Miss. Code Ann. § 83-11-101(1) (Supp. 1981) (emphasis added).

[50] In determining the scope of the classes of persons insured under the Act, the Mississippi Supreme Court has looked to cases of other states interpreting language substantially similar to that of the Mississippi Act. *See* Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d at 771-77 (analyzing cases from Virginia, California, and South Carolina).

[51] Miss. Code Ann. § 83-11-103(b) (Supp. 1981).

[52] *Id.*

icy applies, and a guest in such motor vehicle to which the policy applies."[53] Coverage is afforded to the second class of insureds only while they are occupying or using the vehicle for which the uninsured motorist policy was issued.[54]

The Mississippi Supreme Court succinctly delineated the difference in the coverage afforded each class of insureds in *Stevens v. United States Fidelity & Guaranty Co.*[55] After noting the two distinct classes[56] created by the Act, the court ruled that coverage against injury for the first class was liberal and extended to all circumstances in which a class member is injured by an uninsured motorist.[57] Referring to the Act, the court noted that the second class was composed only of persons who used the insured motor vehicle with the express or implied consent of the named insured.[58]

Whenever bodily injury is inflicted upon any member of the first class of insureds by the negligence of an uninsured motorist, the insured is covered by the uninsured motorist provisions, regardless of the conditions, location, or circumstances of the injury. Members of the first class of insureds at the time of the injury may be passengers, may be riding motorcycles, may be in public conveyances, or may be pedestrians.[59]

In *Lowery v. State Farm Mutual Automobile Insurance Co.*,[60] the issue was whether the uninsured motorist policy covered Lowery the insured owner and members of his family who were injured while riding in another owned motor vehicle not mentioned in the policy of insurance. Lowery had a policy of automobile liability insurance issued by State Farm providing uninsured motorist coverage. Lowery's minor son, Daniel, lived in the household with his father. While riding his motorcycle, Daniel was injured in a collision caused by an uninsured motor-

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[53] *Id.*

[54] *Id.*

[55] 345 So. 2d 1041 (Miss. 1977).

[56] *Id.* at 1043.

[57] *Id.*

[58] *Id.* For the precise language of the court, see *infra* note 73.

[59] Mullis v. State Farm Mut. Auto. Ins. Co., 252 So. 2d 229, 233 (Fla. 1971), *quoted in* Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 773 (Miss. 1973).

[60] 285 So. 2d 767, 773 (Miss. 1973).

ist. The insurance policy specifically excluded coverage for bodily injuries sustained by an insured occupying any land motor vehicle owned by the named insured, or by any resident of his household, if the vehicle was not described and included in the policy.[61] Accepting the insurance company's argument that the exclusionary clause precluded liability, the circuit court rendered judgment in favor of the insurance company, and Lowery appealed.[62] The Mississippi Supreme Court agreed that Daniel was clearly excluded by the exclusionary provision.[63] The question, however, was whether the terms of the policy conflicted with the requirements of the Act.

The Act specifically defines the insured for whom uninsured motorist coverage is mandated.[64] The exclusionary clause restricted the scope of the coverage provided by the Act and, therefore, violated public policy.[65] The court ruled that Daniel was an insured and was covered by the policy, although Daniel occupied a vehicle not named in the policy.[66]

The first class of insureds under the Act includes not only the named insured, but also "while resident of the same household, the spouse of any such named insured and relatives of either." An example of a relative within the first definition of insureds is found in *State Farm Fire & Casualty Co. v. Wightwick*.[67] The insured's granddaughter, Edith Wightwick, was staying in the household with the insured. While using the insured's car, Edith was injured in a collision with an uninsured motorist. As a relative of the named insured and a resident of the same household, Edith was an insured under the first definition provided in the Act.[68]

The coverage afforded members of the second class of insureds is not as broad as that given to the first class. The second class of insureds is covered by uninsured motorist provisions

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[61] *Id.* at 768.
[62] *Id.*
[63] *Id.* at 769.
[64] *Id.*
[65] *Id.* at 775.
[66] *Id.* at 778.
[67] 320 So. 2d 373 (Miss. 1975).
[68] *Id.* at 374.

only while they are using the vehicle covered by the uninsured motorist policy.

Saint Paul Fire & Marine Insurance Co. v. Arnold,[69] illustrates an example of the second class of insureds. In *Arnold,* the automobile liability policy containing the uninsured motorist provisions was issued to an airport limousine company. Arnold, one of the drivers for the company, was the insured and sustained an injury while driving the limousine in the course of his employment. Because he had used the vehicle with the consent of the named insured, Arnold was covered as a member of the second class of persons afforded coverage under the Act.[70]

Since coverage is afforded the second class of insureds only while they are using the vehicle to which the policy applies, the question arises as to what constitutes "use" of the vehicle. In *Stevens v. United States Fidelity & Guaranty Co.,*[71] whether the injured party was an insured depended on whether he was "using" the insured vehicle at the time of the accident. On the day of the accident, Stevens, a wrecker driver for G & N Motors, was dispatched to the scene of a collision in G & N's wrecker. Upon arrival, he hooked up one of the wrecked vehicles and moved it. After moving the vehicle, he got out of the wrecker to sweep debris off the road. On his way back to the wrecker, Stevens was struck by an uninsured motorist. The G & N wrecker was covered by an insurance policy containing an uninsured motorist endorsement. Stevens sought recovery under the policy for his injuries.[72]

In determining whether Stevens was an insured, the Mississippi Supreme Court noted the different scope of coverage provided to members of the two classes of insureds under the Act.[73]

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[69] 254 So. 2d 872 (Miss. 1971).

[70] *Id.* at 874.

[71] 345 So. 2d 1041 (Miss. 1977).

[72] *Id.* at 1042.

[73] *Id.* at 1043. The court stated:

> The statute creates two distinct classes of insureds with different coverage accruing to each class. The first class consists of the named insured, and while residents of the same household, his spouse and relative of either. Their coverage against injury inflicted by uninsured motorists is quite liberal, extending to all circumstances when a member of the first class is injured by an uninsured motorist. This broad protection to members of the first class arises by virtue of

While the named insured and relatives in his household are afforded very broad coverage, the second class of insureds, the permissive users, have coverage limited to that period of time during their use of the insured vehicle.[74]

The court ruled that the Mississippi Act is to be construed liberally to accomplish its purpose. The policy of the Act is to provide a person injured by an uninsured motorist the same protection he would have had if injured by a motorist with a standard liability policy. The court held that Stevens was using the wrecker at the time of the accident and was, therefore, an insured under the terms of the uninsured motorist policy.[75] The court reasoned that the removal of debris from the highway was a necessary part of the wrecker's operation; his temporary absence from the wrecker did not amount to an abandonment of the use of the wrecker.[76]

With *Stevens,* Mississippi joined those states broadly defining "use" of an insured vehicle. Coverage has been afforded in other states to persons injured while unlocking the doors of parked cars,[77] lying on part of the vehicle while working on the motor,[78] preparing to put snow chains on the vehicle,[79] standing between two cars attached by jumper cables,[80] alighting from the vehicle,[81] and even walking nearby.[82] Professor Widiss has summarized these cases as "defining coverage either in terms of a reasonable geographic perimeter around an insured vehicle, or a

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the phrase "while in a motor vehicle or otherwise."

The second class consists of any person, "who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies."

Id.

[74] *Id.*

[75] *Id.* at 1043-44.

[76] *Id.* at 1044.

[77] Box v. Doe, 221 So. 2d 666, 671 (La. Ct. App.), *cert. denied,* 254 La. 457, 223 So. 2d 868 (1969).

[78] Hart v. Traders & Gen. Ins. Co., 487 S.W.2d 415, 420-21 (Tex. Civ. App. 1972).

[79] Cocking v. State Farm Mut. Auto. Ins. Co., 6 Cal. App. 3d 965, 86 Cal. Rptr. 193, 197 (1970).

[80] Smith v. Girley, 260 La. 223, 255 So. 2d 748, 753 (1971).

[81] Whitemore v. Nationwide Mut. Ins. Co., 254 S.C. 184, 170 S.E.2d 391, 396 (1970).

[82] State-Wide Ins. Co. v. Murdock, 31 A.D.2d 978, 299 N.Y.S.2d 348, 349, *aff'd,* 25 N.Y.2d 674, 254 N.E.2d 908, 306 N.Y.S.2d 678 (1969).

kind of relationship between the vehicle and the claimant—such that so long as [the insureds] are within that area or engaged in a task related to the operation of the vehicle,"[83] they are covered.

In sum, under the Mississippi Act, there are two classes of insureds, both of which are broadly defined to effect the Act's purpose. In any stituation in which a person has been injured at the hands of an uninsured driver, the practitioner should examine carefully any policies covering the vehicle the injured person was using, as well as the policies of relatives at the injured party's household. The injured party may be an insured, and uninsured motorist coverage may be available from any one or more of such policies.

B. The Definition of "Uninsured Motor Vehicle"

The Mississippi Uninsured Motorist Act provides protection for persons legally entitled to recover damages for bodily injury or death resulting from the negligence of the owner or operator of an uninsured motor vehicle.[84] The term "uninsured motor vehicle" is specifically defined by statute. The definition includes five types of vehicles that are deemed uninsured motor vehicles for the purpose of coverage under Mississippi law: (1) a motor vehicle as to which there is no liability insurance covering bodily injury; (2) a motor vehicle as to which the insurer has denied coverage or is insolvent; (3) a motor vehicle the liability insurance on which is in limits less than the limits applicable under the injured person's uninsured motorist coverage; (4) a motor vehicle as to which the bond or deposit in lieu of liability insurance is less than the legal liability of the injuring party; and (5) a motor vehicle the owner or operator of which is unknown.[85]

The question of whether a vehicle was uninsured within the definition of the Act was first raised in the Mississippi Supreme

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[83] A.WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.11, at 35 (Supp. 1978).

[84] MISS. CODE ANN. § 83-11-101(1) (Supp. 1981).

[85] *Id.* § 83-11-103(c)(i)-(v). This statute was amended in 1979 to include the "underinsured" aspect of the definition. Act of March 23, 1979, ch. 429, 1979 Miss. Laws 758 (codified at MISS. CODE ANN. § 83-11-103(c)(iii) (Supp. 1981); *see infra* notes 123-35 and accompanying text.

Court in *Hodges v. Canal Insurance Co.*[86] There, the liability insurer of the vehicle whose driver was at fault denied coverage because the negligent driver refused to cooperate in the defense of the suit. At issue was whether this denial of coverage by the insurer rendered the vehicle uninsured under the Act. The court determined that it would be inconsistent with the purpose of the Act if the policy were to be construed narrowly so as to deny protection when coverage is denied by the liability carrier.[87] The provisions of the Act and the terms of policies issued thereunder "must be construed from the perspective of the injured insured, from whose standpoint a tortfeasor operating an automobile with no insurance available is an uninsured motorist."[88] The court held that the vehicle was uninsured, and protection was afforded under the Act.[89]

In *State Farm Mutual Automobile Insurance Co. v. Talley*,[90] the liability insurance carrier failed to provide the negligent motorist with representation in a suit by the injured party. The court faced the question of whether such failure constituted a denial of coverage by the carrier that would allow the injured party to proceed under his uninsured motorist policy. The court ruled that the failure of the carrier to defend the suit against the negligent motorist constituted a denial of coverage "in the most meaningful sense."[91] In failing to provide counsel to the negligent motorist, "the company's action spoke louder than words and constituted an effective and complete denial of coverage under its policy."[92] This failure to provide counsel was sufficient to bring the vehicle within the definition of an uninsured motor vehicle under the terms of the policy and the Act.[93]

The supreme court examined the contours of the definition

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[86] 223 So. 2d 630 (Miss. 1969) (per curiam).

[87] *Id.* at 633.

[88] *Id.* at 634.

[89] *Id.* at 633-34.

[90] 329 So. 2d 52 (Miss. 1976).

[91] *Id.* at 56.

[92] *Id.* The court quoted Professor Widiss for the proposition that, if the denial is not bona fide, the uninsured motorist insurance carrier would have rights of subrogation, up to the amount that is paid, against the liability carrier who wrongfully denied coverage. *Id.* at 54-56 (quoting A. Widiss, *supra* note 83, § 2.32, at 66 (1969)).

[93] 329 So. 2d at 56.

of "uninsured motor vehicle" in *Harthcock v. State Farm Mutual Automobile Insurance Co.*,[94] where the insured was injured while riding as a passenger on a motorcycle. Liability insurance covered the motorcycle, but the policy carried an exclusion denying recovery to any person injured while riding on the insured vehicle. The court held that the motorcycle was an uninsured motor vehicle, since there was no bodily injury liability insurance available to the insured because the motorcycle's policy excluded riders.[95] The court pointed out that the provisions of the Act must be viewed from the perspective of the injured insured. From this perspective, the motorcycle was an uninsured motor vehicle.[96]

A situation similar to *Harthcock* was presented in *Preferred Risk Mutual Insurance Co. v. Poole*,[97] a diversity action in federal court. Preferred Risk sought declaratory relief regarding its rights and liabilities under an automobile insurance policy it had issued to Poole, a contractor. Poole regularly employed his son-in-law, Lovelace, and two other workers, Gattis and Morris. Lovelace drove Poole's insured pickup, which was used in the contracting business, from a job one night with Gattis and Morris as passengers in the vehicle. The vehicle left the road and plunged into a ditch, killing all three occupants. The heirs of Morris and Gattis filed suit in state court against Lovelace's administrator and Preferred Risk reacted by seeking declaratory relief and contended that the liability insurance portions of the policy it had issued to Poole excluded coverage because of an employee exception. Applying Mississippi law, the district court agreed, holding that the employee exclusion clause defeated coverage under the policy.[98]

By the policy's terms, the truck was not an uninsured motor vehicle, although no insurance was available to its occupants.[99]

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[94] 248 So. 2d 456 (Miss. 1971).

[95] *Id.* at 458.

[96] *Id.* (citing Hodges v. Canal Ins. Co., 223 So. 2d at 634).

[97] 411 F. Supp. 429 (N.D. Miss.), *aff'd mem. per curiam*, 539 F.2d 574 (5th Cir. 1976).

[98] 411 F. Supp. at 431-32.

[99] *Id.* at 434. The uninsured motorist portion of the policy contained the following language limiting the definition of an uninsured automobile: "[T]he term 'uninsured au-

Relying on *Harthcock*, the court found that the policy's limitating definition of an uninsured motor vehicle conflicted with the definition mandated by the Act and that the Act preempted the policy.[100] Because of the employee exclusion, no liability insurance coverage was available to the heirs of Gattis and Morris. The court deemed itself commanded by *Hodges* and *Harthcock* to view the Act from the perspective of the injured insured.[101] From this perspective, the pickup truck was an uninsured motor vehicle in spite of the policy clause to the contrary.

In a recent case, *Aitken v. State Farm Mutual Automobile Insurance Co.*,[102] the supreme court apparently did not construe the policy and the Act from the viewpoint of the injured party in determing whether an automobile was uninsured. The plaintiff in *Aitken* was injured in a one-vehicle collision while riding as a passenger in her own automobile. The car was operated by her fiance', Aitken, with her permission. Aitken's insurance had expired, and the liability portions of the plaintiff's policy were inapplicable to injury to herself. From the perspective of the injured insured, Aitken had no insurance. The court held, however, that the automobile was not an uninsured motor vehicle for purposes of uninsured motorist coverage.[103] Since the plaintiff's policy listed the automobile as the insured vehicle, the court ruled that "[t]he vehicle cannot be both 'Insured' and 'Uninsured' in the same policy."[104] Because Aitken was driving the vehicle with the plaintiff's permission, he would have been insured for purposes of uninsured motorist coverage had he been injured by a second vehicle. For this reason, the court ruled, "Neither can Thomas Aitken be an 'Insured' under the policy . . . and, at the same time, be an 'Uninsured Motorist' under the policy."[105]

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tomobile' shall not include: (i) an automobile defined herein as an 'insured vehicle'; (ii) an automobile owned by the named insured as stated in the policy . . . ." *Id.* The pickup truck in which the parties were riding was the insured vehicle as defined by the policy. *Id.*

[100] *Id.* at 439.

[101] *Id.*

[102] 404 So. 2d 1040 (Miss. 1981).

[103] *Id.* at 1043.

[104] *Id.*

[105] *Id.*

The court's statements in *Aitken* are misleading when applied to other situations. The automobile may well have been insured for purposes of liability payments to third parties but uninsured because the policy excluded its occupants.[106] Similarly, the driver, Aitken, may have been insured in the event of injury by a third party, but uninsured from the perspective of the plaintiff, from whose viewpoint the issue must be determined for purposes of uninsured motorist coverage.[107]

Since the plaintiff and her fiance' married prior to filing the suit, the case was actually controlled by the doctrine of interspousal immunity.[108] The case is valid authority on the immunity issue in uninsured motorist cases, but dicta in the case as to the determination of whether the automobile was an uninsured motor vehicle is contradictory to the previous rulings of the court.[109]

A special definition of uninsured motor vehicle is applicable in the case of an unknown hit-and-run driver.[110] Since the purpose of uninsured motorist insurance is to provide coverage to the injured party where no insurance is available from the party at fault, such coverage is required where the identity of the neg-

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[106] *See* Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. at 433, 439 (vehicle insured for purposes of liability but uninsured for purposes of coverage of occupants because of cross-employee exclusion clause).

[107] The statutory definition of the term "insured" in the Act applies only to the uninsured motorist portion of a policy. MISS. CODE ANN. § 83-11-103(b) (Supp. 1981).

[108] 404 So. 2d at 1043.

[109] Without citing authority, the court in *Aitken* stated, "Actually the purpose of the [uninsured motorist] statute . . . was to cover injuries caused by *another and separate* motor vehicle owned or operated by a person who did not have liability insurance coverage . . . ." *Id.* at 1043 (emphasis added).

The *Aitken* court did not cite or discuss the *Poole* decision; neither did it discuss the *Hodges* or *Harthcock* decisions that required that the issue of the tortfeasor's uninsured status be viewed from the perspective of the injured party. *See supra* text accompanying note 88.

[110] MISS. CODE ANN. § 83-11-103(c)(v) (Supp. 1981) sets forth one definition of an uninsured motor vehicle:

> A motor vehicle of which the owner or operator is unknown; provided that in order for the insured to recover under the endorsement where the owner or operator of any motor vehicle which causes bodily injury to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by such unknown person and the person or property of the insured.

ligent party is unknown. This situation usually involves the hit-and-run tortfeasor. If the tortfeasor flees, the insured is left with no source of recovery. If the identity of the hit-and-run driver is not ascertained, it is impossible to know whether he was insured. Thus, no coverage would be available to the injured party from the tortfeasor. Under the Mississippi Act, uninsured motorist coverage applies in such a situation.

The hit-and-run situation gives rise to unique problems. Uninsured motorist coverage for the negligence of an unknown motorist could be subject to abuse or fraud.[111] In the case of a one-vehicle wreck, for example, where the insured vehicle leaves the road injuring the occupants, it would be an easy matter for the injured driver to claim he was run off the road by a negligent motorist who did not stop following the wreck. To prevent such abuse the Mississippi Act, like the statutes in many other states, contains a requirement of physical contact in the case of an unknown tortfeasor.

In *Aetna Casualty & Surety Co. v. Head*,[112] the Mississippi Supreme Court faced the question of whether a soft drink bottle that struck the insured after being thrown from an unidentified vehicle constituted physical contact. The supreme court denied coverage, holding that the physical contact requirement was not satisfied.[113]

The insurance policy in *Head* included a hit-and-run vehicle in its definition of an uninsured motor vehicle. The definition required that the bodily injury arise "out of physical contact with such vehicle." The court ruled that the language was not misleading or ambiguous; the definition required physical contact with the vehicle itself.[114]

At the time *Head* was decided, there were no applicable Mississippi cases construing the physical contact requirement with regard to uninsured motorist insurance. In a previous Mississippi case, the supreme court construed a physical contact re-

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[111] *E.g.*, Montoya v. Dairyland Ins. Co., 394 F. Supp. 1337, 1340 (D.N.M. 1975) (recognizing possibility of fraudulent motivation by one claiming injury caused by a hit-and-run driver).

[112] 240 So. 2d 280 (Miss. 1970).

[113] *Id.* at 281.

[114] *Id.* at 282.

quirement with regard to property insurance covering a building. In *George v. Mississippi Farm Bureau Mutual Insurance Co.*,[115] a property damage policy provided that loss from damage by vehicles was covered only in the event of "actual physical contact" of a vehicle with the insured building. A bulldozer pushed loose material into a cut in front of the insured building, and the weight of the loose material caused the building to fall. Coverage was denied because no actual physical contact occurred between the bulldozer and the building.[116] Relying on *George*, the *Head* court held that the physical contact requirement had not been satisfied and denied recovery.[117]

In *Head*, the court applied the strict construction rule, which calls for a literal construction of the insurance policy's physical contact requirement. Although decisions in other states have also applied the strict construction rule,[118] the trend generally is to allow recovery where the existence of an accident-causing vehicle can be established. For example, a transmission of physical force rather than actual contact has been held to suffice when a hit-and-run vehicle struck another vehicle, which in turn struck the plaintiff's automobile.[119] The physical contact requirement was designed to prevent fraudulent claims and should not be extended to defeat recovery in cases where fraud does not exist.

Nationally, a split of authority currently exists as to what constitutes sufficient contact within the physical contact requirement. In several states, the physical contact requirement has been totally invalidated on grounds of public policy.[120] Since

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[115] 250 Miss. 847, 168 So. 2d 530 (1964).

[116] *Id.* at 851-52, 168 So. 2d at 531-32.

[117] 240 So. 2d at 282.

[118] *See, e.g.*, Lawrence v. Beneficial Fire & Casualty Ins. Co., 8 Ariz. App. 155, 444 P.2d 446, 449 (1968) (strictly construed "unambiguous" language of insurance policy to require physical contact before recovery); Ferega v. State Farm Mut. Auto. Ins. Co., 15 Ill. App. 3d 246, 303 N.E.2d 459, 460 (1973) (plain, ordinary meaning of policy language requires physical contact), *aff'd*, 58 Ill. 2d 109, 317 N.E.2d 550 (1974); Jett v. Doe, 551 S.W.2d 221, 222 (Ky. 1977) (upholding right of insurer to restrict coverage to situations involving occurrence of physical contact).

[119] Inter-Insurance Exch. of Auto. Club v. Lopez, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834, 837 (1960).

[120] *See, e.g.*, State Farm Fire & Casualty Co. v. Lambert, 291 Ala. 645, 285 So. 2d 917, 920 (1973) (holding physical contact requirement in derogation of uninsured motor-

the uninsured motorist statutes in such states do not require physical contact in a hit-and-run situation, policies requiring contact have been found to be void. The wisdom of the physical contact requirement has been criticized in the decisions of several states. For example, the Florida Supreme Court has ruled that whether an accident occurred in the manner described by the injured party is a question of fact. If the injured party can convince the jury that an accident occurred, he should be allowed to recover.[121]

For the time being, physical contact remains a statutory requirement in Mississippi in the case of an unidentified hit-and-run driver. It is important to note that the physical contact requirement is applicable only when the identity of the negligent tortfeasor is unknown. Many practitioners and policy-holders are under the erroneous impression that physical contact is always a prerequisite to uninsured motorist coverage. This is not the case; the Act requires physical contact only where the identity of the owner or operator of the motor vehicle causing the injury is unknown. No physical contact is required if the identity of the tortfeasor is learned and if the vehicle causing the injury is uninsured.[122]

C. The "Underinsured" Motorist

The definition of "uninsured motor vehicle" was amended in 1979 to include the underinsured motorist.[123] Prior to the

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ist statute); Farmer's Ins. Exch. v. McDermott, 34 Colo. App. 305, 527 P.2d 918, 920 (1974) (physical contact requirement contained in policy held an impermissible restriction on broad coverage under statute); Abramowicz v. State Farm Mut. Auto. Ins. Co., 369 A.2d 691, 694 (Del. Super. Ct. 1977) (policy requirement of physical contact held more restictive than statute and void as against public policy), *aff'd*, 386 A.2d 670 (Del. 1978).

[121] Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971).

[122] Miss. Code Ann. § 83-11-103(c)(v) (Supp. 1981), which requires physical contact in hit-and-run situations, refers only to an "unknown" owner or operator of a motor vehicle that causes bodily injury to the insured.

[123] Act of March 23, 1979, ch. 429, 1979 Miss. Laws 758 (codified at Miss. Code Ann. § 83-11-103(c)(iii) (Supp. 1981)). The 1979 amendment added, as a new definition of "uninsured motor vehicle," the following: "an insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage . . . ." Miss. Code Ann. § 83-11-103(c)(iii) (Supp. 1981).

amendment, injured parties often would have been better off financially if the tortfeasor had been uninsured, rather than if the tortfeasor had carried liability insurance in the minimum amounts required by the financial responsibility act. *McMinn v. New Hampshire Insurance Co.*[124] illustrated this situation. The negligent tortfeasor carried liability insurance in the amount of $5,000, the minimum amount then required by statute, but the plaintiff's damages greatly exceeded $5,000.[125] Because of the stacking of uninsured motorist policies, more than $5,000 insurance was available under the uninsured motorist provisions of the plaintiff's policies. The tortfeasor was underinsured since his liability coverage was insufficient to pay the full amount to which the plaintiff was entitled to as damages.[126]

The tortfeasor's liability insurer had already paid the plaintiff the $5,000 liability limit.[127] The plaintiff sought recovery from his own uninsured motorist carriers, under the stacked uninsured motorist policies for the balance of his damages. The plaintiff argued that since the liability insurance carried by the tortfeasor was insufficient to pay the plaintiff the full amount of his damages, the tortfeasor was uninsured within the meaning of the Mississippi Uninsured Motorist Act for the excess damages.[128] The Mississippi Supreme Court rejected the plaintiff's contention, ruling that since the tortfeasor carried liability insurance in compliance with the minimum requirements of the Safety-Responsibility Act, he was not an uninsured motorist within the meaning of the Uninsured Motorist Act as it then read and the uninsured motorist coverage of the plaintiff's policies was inapplicable.[129] In *McMinn,* Mississippi joined the majority of states that had refused to include the underinsured motorist within the definition of an uninsured motorist.[130]

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[124] 276 So. 2d 682 (Miss. 1973). Chrestman v. State Farm Mut. Ins. Co., 276 So. 2d 685 (Miss. 1973), was argued with *McMinn.* In a memorandum opinion, the supreme court stated that *Chrestman* was controlled by *McMinn. Id.* at 685. The two cases presented similar factual situations.

[125] 276 So. 2d at 684.

[126] *Id.* at 683.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See, e.g.,* Harsha v. Fidelity Gen. Ins. Co., 11 Ariz. App. 438, 465 P.2d 377, 379

By including the underinsured motorist in the statutory definition of uninsured motorist through the 1979 amendment, the legislature allowed each vehicle owner to determine the amount of uninsured motorist protection he desires to purchase. Because of the relatively inexpensive nature of the coverage, many policies now contain uninsured motorist coverage in excess of the minimum amount of liability coverage required by the financial responsibilty law.

The 1979 amendment has added an entirely new dimension of uninsured motorist protection to Mississippi law. The practitioner should be alert for underinsured motorist coverage any time the damages suffered by his client exceed the liability coverage of the negligent party.

Underinsured motorist coverage is of recent origin throughout the United States. At least eighteen states in addition to Mississippi have underinsured motorist statutes.[131] Since the statutes of many states, like the one in Mississippi, were so recently enacted, decisions interpreting them are just arising. As questions of first impression arise under the new Mississippi statute, the supreme court will no doubt compare the underinsured motorist provisions of the statutes from sister states to Mississippi's. The court will look for guidance to the decisions arising under similar statutes and will distinguish those based upon underinsured motorist statutes with different provisions.[132]

In *St. Arnaud v. Allstate Insurance Co.*,[133] the district court, applying Mississippi law, had the opportunity to interpret the underinsured provisions of a policy. The court held that

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(1970) (tortfeasor carrying statutorily required amount of liability insurance held not an uninsured motorist although plaintiff's damages exceeded tortfeasor's liability coverage); Smiley v. Estate of Toney, 44 Ill. 2d 127, 254 N.E.2d 440, 442 (1969) (same); Detrick v. Aetna Casualty & Sur. Co., 261 Iowa 246, 158 N.W.2d 99, 104-05 (1968) (same).

[131] For examples of underinsured motorist statutes, see CONN. GEN. STAT. ANN. § 38-175c(b)(2) (West Supp. 1982) (underinsured motorist statute); FLA. STAT. ANN. § 627.727(2)(b) (West Supp. 1982) (same); ILL. ANN. STAT. ch. 73, § 755a-2 (Smith-Hurd Supp. 1982) (same); IOWA CODE § 516A.1 (Supp. 1981) (same); LA. REV. STAT. ANN. § 22:1406(D)(2)(b) (West 1978) (same).

[132] *See* Yaden v. Hanover Ins. Co., 375 So. 2d 5, 7 (Fla. Dist. Ct. App. 1979) (Florida's underinsured motorist statute, with language similar to Mississippi's, interpreted not to allow stacking of tortfeasor's uninsured motorist insurance with uninsured motorist insurance of injured person), *cert. denied*, 383 So. 2d 1205 (Fla. 1980).

[133] 501 F. Supp. 192 (S.D. Miss. 1980).

where an ambiguity existed in the limiting clause of an insurance policy, the stacking of the uninsured motorist coverage would be allowed to determine the insurer's limits of liability under the underinsured motorist provision.[134] The court noted that the issues in the case were similar to those that would be encountered under the new underinsured motorist provision of the Act.[135]

D. Coverage in the Case of Wrongful Death

The applicability of uninsured motorist coverage in the case of wrongful death has been questioned in some states. The argument against such recovery is that since the wrongful death action is a statutory cause of action, it is beyond the scope of the uninsured motorist protection.[136] Today, however, the vast weight of authority supports wrongful death recoveries under the uninsured motorist endorsement.[137]

The Mississippi Act specifically provides coverage in the case of wrongful death.[138] The statutory definition of "insured" includes the personal representative of the covered person,[139] and damages may be recovered for death.[140]

In numerous cases decided under the Mississippi Act, recovery for wrongful death has been awarded.[141] Wrongful death

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[134] *Id.* at 194.

[135] *Id.* at 193 n.l.

[136] *See* R. LONG, *supra* note 11, § 24.17, at 24-39 (common language of uninsured motorist policies ostensibly precludes wrongful death claims).

[137] *See, e.g.*, MFA Mut. Ins. Co. v. Lovins, 248 F. Supp. 108, 115 (E.D. Ark. 1965) (allowing recovery in wrongful death action under uninsured motorist policy); Zeagler v. Commercial Union Ins. Co., 166 So. 2d 616, 618 (Fla. Dist. Ct. App. 1964) (same), *cert. discharged as improvidently issued*, 172 So. 2d 450 (Fla. 1965); Satzinger v. Satzinger, 156 N.J. Super. 215, 383 A.2d 753, 756-57 (Ch. Div. 1978) (same).

[138] MISS. CODE ANN. § 83-11-101(1) (Supp. 1981). This subsection requires the insurer "to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury *or death*." *Id.* (emphasis added).

[139] *Id.* § 83-11-103(b).

[140] *Id.* § 83-11-103(a).

[141] *See* Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 439 (N.D. Miss.), *aff'd mem. per curiam*, 539 F.2d 574 (5th Cir. 1976) (allowing recovery for wrongful death); State Farm Fire & Casualty Co. V. Magee, 368 So. 2d 230, 233 (Miss. 1979) (same); Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1380 (Miss. 1977) (same); Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 430 (Miss. 1973) (same).

cases involving uninsured motorists have given rise to questions regarding the scope of such coverage. In *Gillespie v. Southern Farm Bureau Casualty Insurance, Co.*,[142] for example, the court denied coverage because the decedent was not an insured. The plaintiffs were two children of the decedent, who was killed in an accident involving an uninsured motorist. The decedent was not a resident of either of the plaintiffs' households and was not an insured under their policies. The plaintiffs' policies of uninsured motorist insurance provided for payment of damages for bodily injury "sustained by the insured."[143] The plaintiffs contended that since the language of the Act does not require bodily injury to the insured, such a requirement in the policy conflicted with the Act and was void.[144] The court upheld the validity of the provision and denied coverage because the decedent was not insured under any of the policies.[145]

Interesting questions regarding uninsured motorist coverage in wrongful death cases were also raised in *Pearthree v. Hartford Accident & Indemnity Co.*[146] and *United States Fidelity & Guaranty Co. v. Pearthree.*[147] These two cases arose from the death of the mother of the plaintiff, Pearthree. The decedent was an insured under policies issued by Hartford and by USF&G. The negligence of an uninsured motorist caused the accident that resulted in the decedent's death.[148] Both policies defined three categories of insureds.[149] The definitions included (1) the named insured, his spouse, and their relatives while they lived in the same household as the insured; (2) any other persons occupying an insured motor vehicle; and (3) any person entitled to recover damages for injuries sustained by members of the other two classes.[150] The addition of the third category expanded the definition of "insured" and extended coverage to

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[142] 343 So. 2d 467 (Miss. 1977).

[143] *Id.* at 468-70.

[144] *Id.* at 469.

[145] *Id.* at 470.

[146] 373 So. 2d 267 (Miss. 1979).

[147] 389 So. 2d 109 (Miss. 1980).

[148] 373 So. 2d at 268.

[149] *Id.* at 271.

[150] *Id.*

wrongful death.

The plaintiff contended that she was an insured under the third definition of the term because she would be entitled to maintain a wrongful death action for the death of her insured mother under the Mississippi wrongful death statute.[151] The supreme court agreed and held that since the insurance companies chose to define "insured" broadly, they "should not be permitted the benefit of any narrower definition employed by the statute."[152]

Because the plaintiff was neither executrix nor administratrix of her mother's estate, the supreme court would not allow her to recover both as an insured and as her mother's legal representative.[153] The supreme court, in reversing the lower court, did allow the stacking of the coverage applicable to multiple vehicles.[154] On remand, the lower court awarded the plaintiff $30,000, ordering Hartford and USF&G each to pay $15,000.[155] On appeal for the second time, the supreme court held that the plaintiff was entitled to prove and be compensated for her loss of her mother's society and companionship.[156] Additionally, she was entitled to prove and be compensated for her one-fifth share of the present net cash value of her mother's life expectancy.[157]

The *Pearthree* cases have been criticized with regard to both the elements of damages allowed and the stacking of coverage in spite of the companies' limits of liability clauses.[158] The supreme court, however, followed established rules of construction by construing ambiguities against the companies drafting the policies and in favor of the covered persons,[159] and by allowing the insurers to expand, but not restrict, the coverage re-

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[151] *Id.*

[152] *Id.*

[153] *Id.* at 272.

[154] *Id.* at 272-73.

[155] 389 So. 2d at 110.

[156] *Id.* at 112.

[157] *Id.*

[158] *See 1980 Mississippi Supreme Court Review, supra* note 2, at 509-14 & 509 n.34 (contending that damages recovered by Pearthree should have been limited to losses personally sustained and that court incorrectly equated terms "insured" and "person" since they involve different aspects of uninsured motorist coverage).

[159] *See supra* note 26 and accompanying text.

quired by the uninsured motorist statute.[160]

Despite the difficulties raised by *Gillespie* and the *Pearthree* cases, uninsured motorist coverage remains a vital and important source of recovery in cases of wrongful death resulting from injury caused by an uninsured motorist.

E. Rejection of Coverage

Under the Mississippi Uninsured Motorist Act, uninsured motorist coverage is mandatory in each policy of automobile liability coverage unless specifically rejected in writing by the purchaser. The Act specifies the method by which coverage may be rejected.[161]

The rejection of uninsured motorist coverage does not arise by implication, and proof of the rejection must be explicit. In *Parker v. Cotton Belt Insurance Co.*,[162] the plaintiff, an employee of the Mississippi State Highway Commission, was injured when an uninsured motorist struck the state-owned vehicle in which he was riding. The Highway Commission had previously advertised to seek bids for liability insurance on all Commission vehicles. Neither the bid specifications nor the Commission minutes made any mention of uninsured motorist coverage, and the policy issued by the successful bidder did not include uninsured motorist coverage.[163]

Parker, as an occupant of the Commission vehicle, qualified as an insured under the Act. In addition, he was covered under the Mississippi Workmen's Compensation Act, and the Commission had paid him medical and weekly benefits. Consequently, the Commission intervened in the lawsuit under the subrogation provisions of the Workmen's Compensation Act.[164]

The Commission contended that uninsured motorist coverage had not been specifically rejected in writing as required by the Act. The coverage, therefore, was written into the policies as

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[160] *See supra* note 28 and accompanying text.

[161] MISS. CODE ANN. § 83-11-101(1) (Supp. 1981) provides that the rejection must be in writing.

[162] 314 So. 2d 342 (Miss. 1975).

[163] *Id.* at 343.

[164] *Id.* at 343-44.

a matter of law. The trial court disagreed and held that no uninsured motorist coverage was afforded under the policies. On appeal, the Mississippi Supreme Court reversed, concluding that the Commission had not rejected the coverage in the manner required by the statute.

The *Parker* court recognized the quasi-public character of the automobile insurance business and noted the policy consideration behind the uninsured motorist statute and the liberal construction that must be afforded the statute to accomplish its purpose. The absence of a request for coverage in the bid proposal did not constitute a rejection. Therefore, the uninsured motorist coverage was written into the policy as a matter of law.[165]

Because uninsured motorist coverage is inexpensive, it is seldom rejected. Experience shows that in the great majority of cases in which a liability insurance policy is found, uninsured motorist coverage will also be present. As seen in the *Parker* case, unless the insured party specifically and unequivocally rejects the coverage, he is protected by uninsured motorist insurance in Mississippi.

IV. The Amount of Coverage ("Stacking")

Once the scope of coverage is determined by the finding of an insured, an uninsured motor vehicle, and an applicable policy containing an uninsured motorist endorsement, there remains the important question of the amount of coverage available. In terms of dollars and cents, one of the most important aspects of uninsured motorist insurance is the concept of "stacking." Stacking allows an insured to recover damages up to the limits of coverage under each policy that includes him in its uninsured motorist coverage or to the limits for each vehicle for which a premium was paid. Because of the broad definition of insured under the Act, a motorist is often covered under the uninsured motorist provisions of more than one policy. Additionally, multi-vehicle families often have insurance policies including uninsured motorist coverage on more than one vehicle. By stacking the uninsured motorist coverages, the injured party may aggre-

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[165] *Id.* at 344.

gate the amounts of coverage available up to the full amount of damages he has suffered.[166]

The stacking question has been litigated throughout the nation, and several factual situations frequently occur. In the first situation, the plaintiff is injured while driving or riding as a passenger in a vehicle he does not own. He is covered by the insurance policy on the occupied vehicle, as well as by his own policy, and he seeks to stack the uninsured motorist coverage of the occupied vehicle with that of his own policy. In the second situation, the plaintiff is injured while in his own vehicle. He is an insured under the provisions of that vehicle, and he is also covered under a separate policy on another vehicle. The third situation that arises is where the plaintiff has paid multiple premiums for the multiple vehicles he owns, but all are covered under one policy. All three situations have been litigated under the Mississippi Act, and all three have been decided favorably to the injured plaintiff.[167]

Several clauses in the standard uninsured motorist endorsements seek to prevent stacking.[168] According to the companies

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[166] *E.g.*, Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381-82 (Miss. 1977) (allowing uninsured motorist coverage to be stacked to extent of insured's damages).

[167] *See* Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 270 (Miss. 1979) (allowing aggregation of coverage from multiple premiums under one policy); Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536, 539 (Miss. 1975) (allowing aggregation of coverage from three separate uninsured motorist policies on three separate automobiles owned by insured); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971) (allowing aggregation of coverage of occupied vehicle with that of plaintiff's own vehicle).

[168] In Harthcock v. State Farm Mut Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971), the insurance company sought to deny the aggregation of coverage by the "other insurance" provision. This provision, commonly found in most policies, provided:

> Other Insurance. With respect to bodily injury to an insured while occupying an automobile not owned by a named insured under this coverage, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this coverage exceeds the sum of the applicable limits of liability of all such other insurance.

Id. at 461; *see also supra* note 41 (example of "other insurance" provision).

In Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267 (Miss. 1973), the insurance company sought to prevent stacking by invoking the limits of liability clause, which provided:

> The limit of liability for Uninsured Motorist (Family Protection) Coverage

issuing the policies, the purpose of such clauses is to place the injured plaintiff in exactly the same, but no better, position as he would have been had the tortfeasor carried liability insurance in the minimum amount required by the Safety-Responsibility Act. The insurance companies argue that stacking allows a party injured by an uninsured motorist to recover more than if he were injured by a financially responsible motorist with liability insurance in the minimum amounts. This contention has been rejected by the courts in Mississippi, and stacking has been allowed.[169]

The primary issue addressed by Mississippi courts in stacking cases has been whether the provisions of the policy that attempt to limit liability are valid in light of the terms and requirements of the Act. Another issue is whether the insurance company should reap a windfall of premiums on more than one policy while limiting the payment of damages to a single amount.[170] The Mississippi Supreme Court has ruled that an injured party's recovery should not be limited by such clauses, and a plaintiff is allowed to stack the amounts of coverage on all policies under which he is insured.

The question of stacking was first raised in Mississippi in *Harthcock v. State Farm Mutual Automobile Insurance Co.*[171] The plaintiff, injured while riding as a passenger on a motorcycle owned by a friend, was an insured under the uninsured mo-

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> stated in the declaration as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the Company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as a result of any one accident.

Id. at 269; *see also* Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1377, 1380 (Miss. 1977) (insurance company attempted to prevent aggregation of coverage by limits of liability clause); Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536, 537-38 (Miss. 1975) (same).

[169] *See* Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971) (stacking of uninsured motorist coverage allowed up to entire amount insured entitled to recover).

[170] *See infra* notes 185 and accompanying text.

[171] 248 So. 2d 456 (Miss. 1971).

torist provisions of both a State Farm policy issued to her husband and a Universal Underwriters policy issued to the friend. The State Farm policy contained an "other insurance clause," which provided that the State Farm uninsured motorist coverage applied only as excess insurance over any other applicable coverage. Since the plaintiff was covered under her friend's policy, State Farm's other insurance clause precluded recovery under its uninsured motorist provisions.[172]

State Farm argued that the purpose of uninsured motorist coverage is to provide the minimum protection required by the financial responsibility law. The terms of the policy clearly relieved State Farm from liability and precluded any uninsured motorist recovery under the policy.[173] The Mississippi Supreme Court rejected the insurance company's argument. While the terms of the policy did indeed relieve State Farm from liability, those terms conflicted with the requirements of the Act, which requires uninsured motorist coverage "to pay the insured all sums to which he shall be legally entitled to recover."[174] The court found the coverage to be mandatory and held that the insurance company could not diminish its undertaking by inserting an other insurance clause in its policy. The court explained that since the statute requires each policy to provide the minimum coverage and since the other insurance clause of the State Farm policy directly contradicted this requirement, the clause was not valid.[175] The plaintiff was allowed to recover under the uninsured motorist provisions of both policies.[176] Since the decision in *Harthcock* in 1971, the stacking of applicable uninsured motorist policies has become firmly established in the Mississippi law of uninsured motorist insurance.

The second stacking question involves an injured plaintiff who owns more than one vehicle and has uninsured motorist protection for the different vehicles under separate policies. The Mississippi Supreme Court confronted this issue in 1976 in

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[172] *Id.* at 457, 461.
[173] *Id.* at 461.
[174] MISS. CODE ANN. § 83-11-101(2) (Supp. 1981).
[175] 248 So. 2d at 461-62.
[176] *Id.*

State Farm Mutual Automobile Insurance Co. v. Bishop.[177] Bishop sustained an injury in a collision with an uninsured motorist. While her car was insured by State Farm, Bishop herself was insured under a separate State Farm policy on another family car. The trial judge allowed Bishop to stack the uninsured motorist coverage under both policies, and State Farm appealed.[178]

Citing *Harthcock*, the supreme court held that the uninsured motorist provisions of the two policies could be stacked.[179] The court ruled that an insurance company cannot limit its liability to one policy where an insured carries two separate and complete uninsured motorist policies from that company.[180]

Harthcock and *Bishop* definitively settled the Mississippi law as to the first two recurring stacking issues. The third issue, the question of stacking the uninsured motorist coverage of different vehicles in the same policy, was not so simply settled. The Mississippi Supreme Court initially faced this problem in 1974 in *Talbot v. State Farm Mutual Automobile Insurance Co.*[181] Talbot owned a policy covering a fleet of four automobiles. While the policy contained uninsured motorist coverage for each of the four vehicles, it also contained a clause limiting the company's liability to the amount specified by the finanacial responsibility law.[182] Did the Mississippi Act render the limits of liability clause void as repugnant to the Act where the four vehicles were all on one policy? The supreme court held that it did not. The court ruled that the parties were free to contract for uninsured motorist coverage in any respect, so long as the required minimum coverage was not reduced.[183] The court held that the mandatory coverage was not reduced by the clause limiting the liability in one policy to the minimum amount required by the financial responsibility law, although more than one vehicle was covered and more than one premium paid. The court found the

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[177] 329 So. 2d 670 (Miss. 1976).
[178] *Id.* at 672.
[179] *Id.*
[180] *Id.* at 672-73.
[181] 291 So. 2d 699 (Miss. 1974).
[182] *Id.* at 700.
[183] *Id.* at 701.

limitations clause to be clear and unambiguous, and therefore binding.[184]

Talbot had an equitable argument for aggregation of the coverage since separate premiums were paid for uninsured motorist coverage on each of the four vehicles covered by the policy. A windfall to the insurance company would result if the company were allowed to collect premiums on four vehicles but were allowed to limit the uninsured motorist coverage to one. This reasoning was a factor in decisions in other states on the identical issue.[185] Chief Justice Gillespie, writing for the majority in *Talbot,* stated that the question of premium payments had no proper place in determining whether the insured could aggregate the coverage.[186] *Talbot*, however, was a 5-4 decision. Justice Broom wrote an impressive dissent, which was joined by Justices Rodgers, Patterson, and Inzer, and argued that the limits of liability provisions were in conflict with the terms of the Act, as well as with the legislative intent behind its passage.[187] Applying the rationale of *Harthcock* and *Hodges*, the dissenting justices contended that State Farm should not be permitted to restrict the coverage for which the insured had paid separate and distinct premiums. According to the dissenting justices, to allow recovery as sought by the plaintiff would further the purpose of the Act to see that all sums to which the insured is entitled are recovered.[188]

The dissenting opinion cited decisions of other jurisdictions on the issue and concluded that where double premiums were paid, double coverage should be expected.[189] Since the insurance company was allowed to stack the premiums charged, the injured plaintiff should be allowed to stack the coverage. The dissenting justices would have construed the perceived ambiguity

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[184] *Id.* at 702.

[185] *See* Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34, 41-42 (1969) (where insured paid two premiums on two automobiles, his coverage extended to $20,000 under policy limiting liability to $10,000 per person); Cunningham v. Insurance Co. of N. Am., 213 Va. 72, 189 S.E.2d 832, 833, 837 (1972) (where insured paid separate and equal premiums on three automobiles insured's estate may stack policies).

[186] 291 So. 2d at 702.

[187] *Id.* at 704.

[188] *Id.*

[189] *Id.* at 705.

in the policy against the insurance company and thus would have rendered the limits of liability clause void.[190]

The following year in *Southern Farm Bureau Casualty Insurance Co. v. Roberts*,[191] the court allowed the plaintiff to stack the uninsured motorist coverage of three separate policies issued by the same insurer. The court held that the limits of liability clause purporting to limit the recovery under the three policies to one payment of $10,000 was in conflict with the Act and was therefore void.[192] The court distinguished *Talbot* on the basis that only one policy existed in *Talbot*, although the policy covered four vehicles.[193] While the coverage in the *Talbot* policy could not be aggregated, stacking was permissible in *Roberts*. Roberts had three separate policies, and the Act required an uninsured motorist endorsement in each policy. Roberts, therefore, was allowed to stack the coverage of each policy.[194]

Noting that Roberts had paid separate premiums for the uninsured motorist coverage under each of the three policies, the court ruled that "the insured who has paid a premium should get all he paid for [and that] the insurer should [not] escape liability for that for which is collected a premium."[195] The court pointed out that it made no difference that all three policies were issued by the same company, since "[t]he insurer was paid a separate premium for each policy, the same as if there were three separate policies issued by three separate companies."[196]

In *Roberts*, a unanimous court reached the equitable result urged by the minority in *Talbot*. On its face, the distinction between the two cases was that the uninsured motorist endorsements in *Roberts* were carried in different policies, while the *Talbot* endorsements were contained in one policy. Since additional premiums were paid for the additional endorsements, whether in one or in several policies, this distinction was certain

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[190] *Id.* at 707.

[191] 323 So. 2d 536 (Miss. 1975).

[192] *Id.* at 537-38.

[193] *Id.* at 538.

[194] *Id.* at 539.

[195] *Id.* at 538 (quoting Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 207 N.W.2d 348, 351-52 (1973)).

[196] 323 So. 2d at 538.

to draw scrutiny by the court again.

This scrutiny came in 1977 in *Hartford Accident & Indemnity Co. v. Bridges*.[197] Bridges, who died of injuries received when struck by a negligent hit-and-run driver, was an insured under a policy that covered three automobiles. Separate premiums were paid for the uninsured motorist coverage of each automobile. The plaintiffs, Bridges' family members, contended that the coverage of the three separate endorsements should be stacked, while the insurance company argued that the recovery should be limited to the coverage of one endorsement.[198] The court, faced squarely with the *Talbot-Roberts* distinction, allowed the stacking of the uninsured motorist coverage of all three vehicles but stopped short of overruling *Talbot*.[199] Instead, the court found the limits of liability clause in Bridges' policy ambiguous and construed this ambiguity against the insurer and in favor of the plaintiffs. The plaintiffs, therefore, were allowed to stack the multiple coverage, although the endorsements were contained in one policy.[200]

In discussing the matter of payment of separate premiums for the separate endorsements, the court relied upon the opinion of the trial judge, who observed that the supreme court appeared to place greater emphasis on whether a separate premium is charged for uninsured motorist coverage for several vehicles.[201] The trial judge found persuasive the argument that the insured should be entitled to coverage for which he had paid, limited only by any damages that were judicially determined.[202]

The supreme court reasoned that *Talbot* supported the proposition that, by the use of clear and unambiguous language, an insurer legally could insure more than one automobile within the same policy and still limit the policy's uninsured motorist coverage to the minimum amount allowed by law.[203] The court noted that in *Talbot* a lump-sum premium was paid, while in *Bridges*

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[197] 350 So. 2d 1379 (Miss. 1977).
[198] *Id.* at 1380-81.
[199] *Id.* at 1381.
[200] *Id.* at 1382.
[201] *Id.* at 1381.
[202] *Id.*
[203] *Id.*

a separate premium was paid for uninsured motorist coverage.[204] The court held this distinction sufficient to raise a rebuttable presumption that the coverage provided by a single policy would be the same as coverage for the same automobiles provided in separate policies.[205] The court concluded that since there was ambiguity in the limits of liability clause in the Bridges' policy and since such ambiguity is construed against the insurer and in favor of the insured, it was not necessary to overrule *Talbot*.[206]

The supreme court reaffirmed the *Bridges* decision in 1979 in *Pearthree v. Hartford Accident & Indemnity Co.*[207] The limitation of liability clauses in the USF&G and Hartford policies in *Pearthree* were identical in all material respects to the clause in *Bridges*. The court ruled that the application of the *Bridges* reasoning to a materially equivalent limitation clause should not surprise any insurer, and the plaintiff was allowed to stack the coverage of the multiple vehicles.[208]

In *Pearthree*, the court's prior ruling that the charging of separate premiums was not decisive was used in favor of the plaintiff. Evidence revealed that USF&G charged separate premiums for the uninsured motorist coverage of each of the automobiles covered by its policy. It was not clear whether Hartford charged separate premiums. The court ruled that the plaintiff would be allowed to stack the coverages of the Hartford policy, regardless of whether separate premiums were charged.[209]

Pearthree did not totally discard the *Bridges* presumption arising from the charging of separate premiums. *Pearthree* did make clear, however, that the charging of such premiums is not decisive in the face of multiple automobile coverage under ambiguous limitation clauses. As the law now stands, the critical question is whether the limiting provisions of the policy are ambiguous.

A concise review of the Mississippi cases on the issue of stacking multiple coverages within a single policy was set forth

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[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] 373 So. 2d 267 (Miss. 1979).
[208] *Id.* at 270.
[209] *Id.*

in *St. Arnaud v. Allstate Insurance Co.*,[210] a 1980 federal district court decision. The *St. Arnaud* court reviewed the *Roberts, Bishop, Bridges,* and *Pearthree* decisions and concluded that permitting the aggregation of coverage flows from the ambiguity of the limiting clause in the policy.[211] In *St. Arnaud,* the court found the limiting clause ambiguous and allowed the stacking of the uninsured motorist coverage of multiple vehicles covered by the same policy.[212]

In 1981, the Fifth Circuit Court of Appeals decided a Mississippi case involving the stacking issue. In *Blansett v. American Employers Ins. Co.*,[213] the Fifth Circuit found the insurance company's limits of liability clause clear and unambiguous.[214] Thus, although a separate premium had been paid for each of seven vehicles under the uninsured motorist policy, stacking within the single policy was denied.[215] While recognizing that the Mississippi Supreme Court had not interpreted the exact language found in the present policy[216] and that the supreme court regularly afforded diligent protection to an injured

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[210] 501 F. Supp. 192 (S.D. Miss. 1980).

[211] *Id.* at 194.

[212] *Id.* at 194-95.

[213] 652 F.2d 535 (5th Cir. 1981) (per curiam).

[214] *Id.* at 537. The limits of liability clause provided:

> Regardless of the number of (1) persons or insureds under this policy, (2) persons who sustain bodily injury, (3) claims made or suits brought on account of bodily injury, or (4) highway vehicles to which this policy applies,
>
> (a) The limit of liability stated in the schedule as applicable to "each person" [$10,000] is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person," the limit of liability stated in the schedule as applicable to "each accident" [$20,000] is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident.

Id. at 536-37.

[215] *Id.* at 537. After recovering an $85,000 judgment for bodily injuries sustained in a collision with an uninsured motorist, Blansett sought to aggregate the seven policy limits of $10,000 each. The insurance company contended that the insurance policy did not permit stacking and moved to dismiss Blansett's suit for lack of jurisdiction since the amount in controversy did not exceed $10,000, excluding costs or interest. The district court sustained the insurance company's motion to dismiss. *Id.* at 535.

[216] *Id.* at 536.

party,[217] the court of appeals nevertheless stated: "Invention fails us. Even straining to do so, we can discern no relevant ambiguity in this language."[218]

Unlike Mississippi, other states have rejected the *Talbot-Roberts* distinction between endorsements in separate policies and those in a single policy.[219] The argument for rejecting this distinction in Mississippi was strengthened by the 1979 amendment to the Act. The insurance companies' argument that the purpose of uninsured motorist insurance is to provide only the minimum amount of coverage is refuted by the amended Act, which specifically provides for greater coverage for the conscientious motorist who desires to pay for it.[220] The amendment indicates that the purpose of uninsured motorist insurance in Mississippi is to provide the injured party with a means to recover all sums to which he is entitled.[221]

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[217] *Id.* Citing Pearthree v. Hartford Accident & Idem. Co., 373 So. 2d 267 (Miss. 1979), the court of appeals acknowledged that "recent decisions of the Mississippi Supreme Court have been diligent in their scrutiny of policies for ambiguity in such situations as this, ascertaining it where we might perhaps not have done so." 652 F.2d at 536.

[218] 652 F.2d at 537.

[219] *See* Fletcher v. Aetna Casualty & Sur. Co., 80 Mich. App. 439, 264 N.W.2d 19, 21 (1978) (stacking of policies not governed by mere number of premiums paid or policies issued by insurer), *aff'd sub nom.* Bradley v. Mid-Century Ins. Co., 409 Mich. 1, 294 N.W.2d 141 (1980).

[220] *See supra* note 123 and accompanying text.

[221] Many insurance companies now issue a "plain english" automobile policy setting forth the uninsured motorist endorsement in lay terms, supposedly more easily understood. The limits of liability clause of one such policy provides:

> The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for all damages resulting from any one accident. This is the most we will pay regardless of the the number of:
>
> 1. **Covered persons;**
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the accident.
>
> Any amounts otherwise payable for damages under this coverage shall be reduced by all sums:
>
> 1. Paid because of the bodily injury or **property damage** by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part A of the policy; and
> 2. Paid or payable because of the bodily injury under any of the following or similar law:
>
> a. workers' compensation law; or
> b. disability benefits law.

Another situation involving multiple coverage under the same policy arises in a two-car collision in which the drivers of both the insured vehicle and the uninsured vehicle are negligent and a passenger in the insured vehicle is injured. Most uninsured motorist policies contain an "off-set" provision stating that any payment to the passenger under the uninsured motorist endorsement reduces the amount payable under the liability provisions of the policy. Thus, if there is $10,000 uninsured motorist coverage and $10,000 liability coverage and both the drivers are negligent, the off-set provision would allow the passenger to recover ony $10,000. The passenger could not recover for the negligence of both drivers, although the negligence of both contributed to his injuries.

Such a provision was invalidated under Mississippi law in *Missouri General Insurance Co. v. Youngblood,*[222] an action in federal court for a declaratory judgment to ascertain the validity of this type of provision under the Mississippi Act. The district court found the off-set provision void as against public policy,[223] and, on appeal, the Fifth Circuit affirmed.

The court of appeals noted the policy of the Mississippi Act and held that an insurance company may not validly offset payments made under an uninsured motorist provision against payments due under the bodily injury liability provisions of the same policy.[224] The injured passenger, therefore, was allowed to aggregate the uninsured motorist and liability coverages of the same policy and to recover for the negligence of both drivers.[225]

> No payment will be made for loss paid or payable to the **covered person** under Part D [coverage for damage to auto] of the policy.
>
> Any payment under this coverage will reduce any amount that person is entitled to recover for the same damages under Part A [liability coverage] of the policy.

The USF&G Companies, Personal Auto Policy 2 (1980) (pt. C replacement).

Whether the terms of these "plain english" policies will be interpreted by the Mississippi Supreme Court as ambiguous has not been determined. The test for ambiguity is itself ambiguous, and the matter may be settled more appropriately by the legislature. *Cf. infra* notes 306-08 and accompanying text (legislature determined standards for proof of uninsured status of tortfeasors).

[222] 515 F.2d 1254 (5th Cir. 1975).

[223] *Id.* at 1256 n.2.

[224] *Id.* at 1257.

[225] *Id.* at 1255-56.

The amount of coverage available to the injured party is also affected by the medical payment coverage provisions found in automobile insurance policies. The "med-pay" provisions provide payment for medical expenses incurred as a result of injuries received in an accident involving the covered vehicle. The standard uninsured motorist endorsement contains a set-off clause that attempts to reduce the amount payable under the uninsured motorist provisions by the amount paid under the med-pay provisions.[226]

The question of whether such a set-off clause is valid first arose in *Adams v. State Farm Mutual Automobile Insurance Co.*,[227] a federal district court case. The plaintiff, in state court, sought $10,000 uninsured motorist coverage, plus $1,343.90 medical expenses under the policy's med-pay provisions. The defendant removed the case to federal court.[228] At issue was whether the requisite jurisdictional amount was involved. The court pointed out that federal courts must look to state laws to determine the extent of the plaintiff's claim. As of the date of the *Adams* decision, the Mississippi Supreme Court had not yet ruled on the validity of a med-pay set-off clause in an uninsured motorist policy.[229]

The court noted the well-established rule that clauses providing for payment for medical expenses must be liberally construed in favor of the insured and determined that it was not a legal certainty that Mississippi would refuse recovery under both the med-pay and uninsured motorist provisions, in spite of the policy's set-off clause.[230]

Four years after *Adams*, the Mississippi Supreme Court had

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[226] A typical med-pay set-off clause provides:

> Any amount payable under this [uninsured motorist] coverage because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by:
>
> . . . .
>
> . . . all sums paid or payable on account of such bodily injury under [the medical payment] of a policy issued by this Company . . . .

Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 703 (Miss. 1974).

[227] 313 F. Supp. 1349 (N.D. Miss. 1970).

[228] *Id.* at 1351.

[229] *Id.* at 1353.

[230] *Id.*

occasion to rule on this question in *Talbot v. State Farm Mutual Automobile Insurance Co.*[231] The Mississippi Supreme Court decided, as anticipated by *Adams*, that the insurer could not offset the amount paid under the medical coverage against the amount to be paid under the uninsured motorist coverage. The supreme court found the insurance company's attempt to limit its liability under the uninsured motorist coverage to be in conflict with the statutory requirements concerning uninsured motorist coverage.[232] The set-off clause, therefore, was void, and the stacking of uninsured motorist and medical coverage was allowed.[233]

V. Procedural Aspects of Mississippi Uninsured Motorist Litigation

A. Arbitration

The standard uninsured motorist policy contains a mandatory arbitration clause that requires arbitration of the uninsured motorist claim as a prerequisite to litigation. Despite the historic hostility of the courts to an agreement depriving a party of his access to the jury,[234] mandatory arbitration is valid in many states.[235] In Mississippi, however, mandatory arbitration clauses in uninsured motorist policies are prohibited by statute,[236] guaranteeing an injured person access to the courts in un-

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[231] 291 So. 2d 699 (Miss. 1974).

[232] *Id.* at 703.

[233] *Id.*

[234] *See* Scott v. Avery, 36 Eng. Rep. 1, 17 (1856) (Alderson, J.) (insurance policy prohibiting injured person who refused to accept award of arbitrators from access to court deemed unsupportable).

[235] *See, e.g.*, Jeanes v. Arrow Ins. Co., 16 Ariz. App. 589, 494 P.2d 1334, 1337 (1972) (insurance policy provision requiring arbitration of claims arising under uninsured motorist coverage held not violative of public policy); Government Employees Ins. Co. v. Brunner, 191 Cal. App. 2d 334, 12 Cal. Rptr. 547, 550 (1961) (public policy favoring arbitration is avoidance of delays incident to court proceedings); Travelers Ins. Co. v. Luckett, 279 So. 2d 885, 886 (Fla. Dist. Ct. App. 1973) (affirming "well-established" rule that agreement between insurer and insured to arbitrate claims is binding).

[236] Miss. Code Ann. § 83-11-109 (1972) provides:

> No [uninsured motorist] . . . endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any such endorsement or provisions. The insured shall not be restricted or prevented in any manner from employing legal counsel or instituting or prosecuting to judgment

insured motorist cases. Policy provisions attempting to require arbitration as a prerequisite to litigation are in violation of the statute and are invalid.[237]

B. Direct Action Against the Insurance Company

An uninsured motorist insurance claim in Mississippi may be litigated in an action against the negligent motorist himself. So long as the insurance carrier is given proper notice of the action, a judgment in the suit against the uninsured motorist is binding on the carrier.[238] Shortly after enactment of the Uninsured Motorist Act, the question arose whether an injured party could sue an uninsured motorist insurance carrier directly without first obtaining a judgment against the negligent uninsured motorist. In Mississippi liability insurance cases, direct actions against an insurance company are not allowed. Uninsured motorist cases, however, are of a different breed, arising as actions on the contract of the uninsured motorist insurance. Thus, in uninsured motorist cases, an injured party may proceed directly against an insurance company.[239]

A plaintiff's right to proceed against an uninsured motorist carrier directly was set forth in *Harthcock v. State Farm Mutual Automobile Insurance Co.*[240] In *Harthcock,* the question was succinctly stated: "Could plaintiff maintain a suit against Universal and State Farm [the uninsured motorist carriers] without first establishing liability by suing . . . the uninsured motorist?"[241] The court held that the liability of the negligent uninsured motorist could be established in the contract suit against the insurance carrier without first proceeding in tort against the motorist.[242] The liability of a negligent motorist,

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legal proceedings, but the insured may be required to establish legal liability of the uninsured owner or operator.

[237] *E.g.,* Logan v. Aetna Casualty & Sur. Co., 309 F. Supp. 402, 407 (S.D. Miss. 1970) (compulsory arbitration agreements held unenforceable in Mississippi).

[238] *See infra* text accompanying note 250.

[239] *E.g.,* Farned v. Aetna Casualty & Sur. Co., 263 So. 2d 790, 791 (Miss. 1972) (insured may establish legal liability of uninsured motorist in direct action against insurer); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 460 (Miss. 1971) (same).

[240] 248 So. 2d 456 (Miss. 1971).

[241] *Id.* at 460.

[242] *Id.*

therefore, may be established in the initial direct action against the company.[243] Since *Harthcock,* the right of an injured plaintiff to bring suit in Mississippi directly against an uninsured motorist insurance carrier without first suing the tortfeasor has become firmly established.[244] Under the terms of some policies, a direct action against an insurance company may be the only cause of action available.

In *State Farm Fire & Casualty Co. v. Wightwick,*[245] for example, the insured had obtained a default judgment in her suit against the tortfeasor, but the judgment was not enforceable against the uninsured motorist carrier because the policy required that the liability of the carrier be determined only in a direct action against the carrier.[246] The court in *Wightwick* held that the clause was valid and enforceable; therefore, the insured was required to litigate her claim in a direct action against the carrier.[247] To the same effect is *St. Paul Fire & Marine Insurance Co. v. Arnold,*[248] where the court held that the insurance company, not having consented to the action against the tortfeasor, would not be bound by such an action.[249] In both *Wightwick* and *Arnold,* direct action against the insurance company was a requirement for recovery under the uninsured motorist policies.

If counsel for an injured party desires to pursue the claim in an action against the negligent motorist, rather than against the insurance carrier, he should carefully examine the provisions of the applicable policy for requirements such as those in *Wightwick* and *Arnold.* Such provisions may render an action against the tortfeasor moot as to the uninsured motorist carrier.

C. Notice to the Insurance Carrier

If, after checking the terms of the policy, a plaintiff elects to

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[243] *Id.*

[244] *E.g.,* Farned v. Aetna Casualty & Sur. Co., 263 So. 2d 790, 791 (Miss. 1972) (*Harthcock* established right to sue insurer in direct action).

[245] 320 So. 2d 373 (Miss. 1975).

[246] *Id.* at 374-75.

[247] *Id.* at 375.

[248] 254 So. 2d 872 (Miss. 1971).

[249] *Id.* at 874.

proceed against the negligent motorist, rather than against the insurance carrier directly, he must give the carrier proper notice of the suit. The Act requires that in any suit against the owner or operator of the uninsured vehicle a copy of the process served on the owner or operator must be served by registered mail on the uninsured motorist insurance carrier.[250] The purposes of the notice requirement are to enable the insurance carrier to join in the defense of the uninsured motorist should it so desire and to enable the carrier to protect its rights of subrogation.[251]

The Mississippi Supreme Court examined the notice requirements in *Rampy v. State Farm Mutual Automobile Insurance Co.*[252] Rampy, a Mississippi resident, died as a result of an accident caused by a negligent motorist in Tennessee. Rampy's heirs filed suit against the negligent tortfeasor and obtained a judgment in Tennessee. In attempting to execute the judgment, it became apparent that the tortfeasor was uninsured.[253] The heirs then filed suit in Mississippi on the Mississippi uninsured motorist policy issued to the owner of the vehicle in which Rampy was riding at the time of the collision. The trial court granted the defendant insurance company's motion for a directed verdict since no notice of the suit in Tennessee had been served on the insurance company. The insurance company contended that since the Tennessee one-year statute of limitations had expired before filing of the Mississippi suit, its subrogation rights were prejudiced.[254]

The Mississippi Supreme Court reversed the directed verdict, holding that although the Mississippi Act requires the no-

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[250] MISS. CODE ANN. § 83-11-105 (1972) provides in part:

> In the event the owner or operator of the uninsured vehicle causing injury or death is known and action is brought against said owner or operator by the named insured as defined by said policy, then a copy of the process served upon the owner or operator shall also be served by the circuit clerk mailing, registered mail, a copy of the process to the insurance company issuing the policy providing the uninsured motorist coverage as prescribed by law.

[251] *See* A. WIDISS, *supra* note 83, §§ 7.14-7.15 (1969) (insurer may intervene to present defenses on behalf of uninsured motorist or to join in defense; although absent from litigation, insurer's subrogation rights may be affected).

[252] 278 So. 2d 428 (Miss. 1973).

[253] *Id.* at 430.

[254] *Id.*

tice to be served by the circuit clerk, such a requirement was not binding on the clerk of a foreign court.[255] The court also noted that the notice requirement applied only to the named insured, as opposed to others seeking to recover under the uninsured motorist provisions of the policy.[256] The court further ruled that even as to the named insured, the absence of notice would bar suit "only when substantial prejudice to the rights of the insurer would result."[257]

The court held that the burden rested on the insurer to show prejuduce as a result of the failure to notify the insurance company of the direct action against the tortfeasor. The test is one of substantial prejudice and imposes a stringent burden on the insurance company.[258] In *Rampy,* the uninsured motorist had been convicted of manslaughter in Tennessee as a result of the wreck. In view of the tortfeasor's indigent status, the court found unrealistic the insurance company's argument that it had lost a valuable right of subrogation. Describing an uninsured tortfeasor in such a case as "an impecunious derelict, someone who is mere flotsam and jetsam floating on the sea of economic irresponsibility,"[259] the court found that the insurance company was not prejudiced by the loss of subrogation rights as to such a tortfeasor.

The plaintiffs in *Rampy* did not seek to bind the uninsured motorist carrier by the determination of liability from the Tennessee suit. Rather, they sought again to establish the liability of the tortfeasor in the Mississippi contract action against the company. The court held that if the judgment previously obtained was not used as the basis of the suit against the insurance company, the failure to notify the company of the original suit against the uninsured motorist did not preclude the right to sue

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[255] *Id.* at 433.

[256] *Id.* The court ruled that to require notice by one other than the named insured would impose "an impossible burden on persons who were not contracting parties and who did not have possession of the insurance policy, and could not notify an insurance company of which they had no knowledge about a suit against a negligent motorist." *Id.*

[257] *Id.*

[258] *Id.* at 434.

[259] *Id.* (quoting Lovering v. Erie Indem. Co., 412 Pa. 551, 195 A.2d 365, 367 (1963)).

the company under the uninsured motorist policy.[260]

In *State Farm Fire & Casualty Co. v. Wightwick*,[261] the Mississippi Supreme Court reiterated the rule that the notice requirement is applicable only to suits by the named insured. There, the named insured was the grandmother of Wightwick, the injured party. Wightwick originally filed suit against the negligent tortfeasor, and the clerk of the court mailed notice of the suit to the insurance company pursuant to the Act. The company did not defend, and a default judgment was rendered in plaintiff's favor. Wightwick sought to enforce the default judgment against the company.[262] The supreme court ruled that since the notice bound the company only in a suit by the named insured, State Farm was not a party to the litigation between Wightwick and the negligent motorist and was not bound by the default judgment.[263]

If counsel desires to proceed against the negligent motorist, and if the claim is on behalf of one other than the named insured, the insurance company usually should be joined as a defendant. Failure to join may result in a judgment that is unenforceable against the company.[264]

D. Joinder

Tactical considerations play an important role in the plaintiff's choice to sue the negligent tortfeasor or to proceed directly against the insurance company. On the one hand, the jury observes the normally impecunious status of the motorist as opposed to the deep pocket appearance of the insurance company. In addition, the suit directly against the company is more easily understood by the jury as a contract action in which the plaintiff seeks the insurance benefits for which he has paid his premiums. More favorable venue provisions also often favor direct action against the company.[265] On the other hand, where the plaintiff's

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[260] 278 So. 2d at 435.

[261] 320 So. 2d 373 (Miss. 1975).

[262] *Id.* at 374.

[263] *Id.* at 375.

[264] *Id.*

[265] *See* MISS. CODE ANN. § 11-11-7 (1972) (action may be brought in county where loss occurs or county of company's principle place of business; in action against foreign

injuries greatly exceed the uninsured motorist coverage, the plaintiff may desire to seek a judgment in tort in excess of the coverage. The negligent motorist also may have assets other than insurance from which the excess judgment may be collected.[266]

The company and the negligent tortfeasor are often joined as defendants in one action.[267] Such joinder has been objected to as improper because it joins an action in contract with an action in tort. The joinder of the uninsured driver and the insurance company in the same suit, while at one time prohibited, appears to be proper under current Mississippi procedure. In *Harthcock*, the Mississippi Supreme Court stated that the plaintiff could not sue both the uninsured motorist and the insurance company in the same suit.[268] The reason for the prohibition was that joinder of a suit in tort with one in contract was not allowed in Mississippi at the time. Since *Harthcock*, the Mississippi legislature has abolished the prohibition against joinder of suits in tort and contract.[269] Additionally, the Mississippi Rules of Civil Procedure provide for liberal joinder of claims and parties.[270] Numerous cases are litigated to conclusion without objection with both the tortfeasor and the uninsured motorist carrier named as defendants.[271]

The Mississippi Supreme Court has not directly addressed the uninsured motorist joinder question since the abolition of the prohibition of joinder of claims in contract and tort or since the adoption of the Rules. Joinder of the negligent motorist and the uninsured motorist carrier serves the beneficial purposes of

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company, in county where process served, provided suit is brought in county where loss occurred or where plaintiff resides).

[266] *See* Dunnam v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668, 669 (Miss. 1979) (noting possibility that plaintiff's judgment might be satisfied from assets of bankruptcy estate).

[267] *See* Hodges v. Canal Ins. Co., 223 So. 2d 630, 631 (Miss. 1969) (per curiam) (plaintiff filed suit against negligent tortfeasor and insurer of automobile driven by tortfeasor).

[268] 248 So. 2d at 460.

[269] Miss. Code Ann. § 11-7-36 (Supp. 1981).

[270] Miss. R. Civ. P. 18-20.

[271] Hodges v. Canal Ins. Co., 223 So. 2d 630 (Miss. 1969) (per curiam), is an example of one such case litigated to the supreme court. Many other cases have been lititgated to conclusion in the lower courts.

avoiding a multiplicity of suits and of eliminating the possibility of contradictory results in different suits. In view of the procedural developments in Mississippi during the ten years since *Harthcock,* such joinder appears to be proper.

E. Subrogation

Uninsured motorist insurance is fundamentally different from automobile liability insurance.[272] One major difference is the right of the insurance company to subrogation. While the right of subrogation does not ordinarily exist in automobile liability policies, it is specifically provided for in uninsured motorist coverage by statute.[273]

Any action by the injured insured that prejudices the insurance company's rights of subrogation may result in loss of the injured insured's claim. In *United States Fidelity & Guaranty Co. v. Hillman,*[274] for instance, the insured settled with the tortfeasor and signed a release without the consent of her uninsured motorist carrier. The release precluded any recovery by the insurance company through subrogation under the Act. The insured's uninsured motorist policy prohibited any settlement with a negligent motorist without consent of the company.[275] The court ruled that the insured's releasing the negligent motorist barred her from recovery under the uninsured motorist provisions of her policy.[276]

While the insurance company is entitled to subrogation under the Act against "the person causing injuries," its subrogation rights do not extend to joint tortfeasors.[277] The uninsured

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[272] Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 460 (Miss. 1971). The *Harthcock* court noted this fundamental difference: "[A] suit may not be maintained against an automobile liability insurer until judgment is obtained against the insured. In uninsured motorists insurance the insured is the injured party." *Id.*

[273] MISS. CODE ANN. § 83-11-107 (1972) provides in part:

> An insurer paying a claim under the endorsement . . . shall be subrogated to the rights of the insured to whom such claim was paid against the person causing such injury, death, or damage to the extent that payment was made, including the proceeds recoverable from the assets of the insolvent insurer.

[274] 367 So. 2d 914 (Miss. 1979).

[275] *Id.* at 915-16.

[276] *Id.* at 922.

[277] *E.g.,* Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 459 (Miss.

motorist carrier is subrogated to the insured's rights against the uninsured motorist to the extent that payment is made. This subrogation, however, does not affect the right of the insured to recover from joint tortfeasors whose negligence combined with that of the uninsured motorist to cause the injuries. Thus, where an insured is injured in a two-vehicle collision involving one insured and one uninsured vehicle, the insurance company's subrogation rights under the Act apply to the uninsured joint tortfeasor but not to the insured joint tortfeasor.[278]

Of extreme importance to the injured insured is the priority of the insurance company's subrogation rights. The 1979 case of *Dunnam v. State Farm Mutual Automobile Insurance Co.*[279] decided the question of priority in a manner beneficial to the insured. In *Dunnam,* the insured's injuries exceeded the $10,000 limit of his uninsured motorist coverage, and he obtained a $20,000 judgment against Byrd, the negligent uninsured motorist. Byrd filed a petition in bankruptcy court, and a probability existed that the insured's judgment would be partially satisfied. State Farm refused to pay its uninsured motorist benefits of $10,000 unless the insured would sign an agreement that under the subrogation provisions of the policy and the Act, State Farm was entitled to the first $10,000 collected from the bankrupt.[280] At issue was the priority of the uninsured motorist insurance company's subrogation lien over the judgment lien of the insured.

The lower court held that State Farm was entitled to the first monies collected. The supreme court reversed and determined that the insurance company's rights of subrogation under the Act did not entitle the company to recovery from the judgment debtor until the injured insured had recovered all funds to which she was entitled.[281] Under the Act, the insured's lien took priority over the lien of the insurance company, although the insurance policy specifically called for pro tanto subrogation

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1971) (statute allowing subrogation deals with uninsured motorist rather than joint tortfeasors).

[278] *Id.*

[279] 366 So. 2d 668 (Miss. 1979).

[280] *Id.* at 669.

[281] *Id.* at 672.

with priority to the company. The court held that the policy's subrogation priority provisions conflicted with the requirements of the Act, and since the Act controlled, the provisions of the policy in conflict were void.[282] The court concluded that under the subrogation provisions of the Mississippi Uninsured Motorist Act, the insured was entitled to the full amount of her recovery from the negligent tortfeasor's assets before the insurance company's rights of subrogation could be exercised.[283]

The significance of the *Dunnam* decision lies in the familiar situation in which the injuries of an insured greatly exceed the uninsured motorist coverage available. The negligent motorist, while uninsured, may have other assets or may be likely to acquire additional assets in the future. Such assets would make the judgment at least partially collectible. An injured insured is entitled to recover from the insurance company the full amount of his uninsured motorist coverage and may apply the first monies collected from the negligent motorist to the balance of his judgment before the insurance company's rights of subrogation may be exercised.

Under the decisions of the Mississippi Supreme Court, the insurance company may protect its right of subrogation against loss as a result of acts on the part of its insured. The company, however, may not subordinate the rights of the insured, for whose benefit the statute was enacted.

F. Evidence and the Burden of Proof

In uninsured motorist actions, the burden of proof is on the injured plaintiff to prove each of the necessary elements of his uninsured motorist claim. There are four basic elements of proof:

(1) Plaintiff must establish that he is an "insured"; that is, he must be covered by the provisions of the applicable uninsured motorist policy or policies;
(2) Plaintiff must establish that the tortfeasor's vehicle was an "uninsured automobile" as defined in the

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[282] *Id.* at 670-71.
[283] *Id.* at 672.

policy or statute;

(3) Plaintiff must show that he is "legally entitled to recover" damages from the uninsured motorist; that is, he must show that the uninsured motorist's negligence was the proximate cause of the accident; and

(4) Plaintiff must establish that he was injured as a result of the uninsured motorist's negligence.[284]

The injured plaintiff often has a problem establishing that the negligent tortfeasor was uninsured. In *State Farm Mutual Automobile Insurance Co. v. Stewart*,[285] the plaintiff's attorney had visited the negligent motorist in the hospital following the accident. The tortfeasor gave the attorney an identification card from Liberty Mutual Insurance Company and told the attorney that he was insured with Liberty Mutual at the time of the wreck. The plaintiff later learned that the tortfeasor's Liberty Mutual policy had been canceled before the wreck.[286] At trial, the plaintiff offered, as evidence of the tortfeasor's uninsured status, testimony of the plaintiff's attorney and of the Liberty Mutual surpervisor, who confirmed that the tortfeasor's Liberty Mutual policy had been canceled prior to the wreck. The plaintiff did not call the tortfeasor and offered no other testimony as to the absence of insurance on the tortfeasor's vehicle.[287]

The supreme court reversed the verdict for the plaintiff, finding the evidence insufficient to establish the tortfeasor's uninsured status. The court held the testimony of the plaintiff's attorney inadmissible as hearsay.[288] Without the attorney's testimony, the statements of the Liberty Mutual supervisor that the Liberty Mutual policy had been canceled were of no consequence. The court surmised that the tortfeasor might have had insurance with some company other than Liberty Mutual and unanimously found the evidence of the tortfeasor's uninsured status insufficient to carry the case to the jury.

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[284] *See* State Farm Fire & Casualty Co. v. Wightwick, 320 So. 2d 373, 375 (Miss. 1975) (applying four elements to factual situation).

[285] 288 So. 2d 723 (Miss. 1974).

[286] *Id.* at 724.

[287] *Id.*

[288] *Id.*

While the justices agreed that the plaintiff had failed to meet his burden of proof, they disagreed as to what should be done with the case upon reversal. A majority of justices ruled that the case should be reversed and rendered in favor of the defendant insurer because the plaintiff had had ample opportunity to present sufficient evidence but had failed to do so.[289] Justice Sugg dissented, concluding that the case should be remanded for a new trial to prevent a miscarriage of justice.[290] Justice Sugg argued that had the trial judge sustained the defendant's objection to the testimony of plaintiff's attorney, the plaintiff would have had the opportunity to offer other evidence of the tortfeasor's uninsured status. In the dissent's view, to reverse and render the case in favor of defendant, without affording plaintiff a new trial, denied the plaintiff this opportunity. The plaintiff's recovery in *Stewart* was lost, but the dissenting justices suggested that in future cases, the testimony of the nonresident tortfeasor should be obtained by deposition, thus allowing the question of whether he was uninsured to be resolved with certainty.[291]

In *Stonewall Insurance Co. v. McQueen*,[292] the plaintiffs again encountered problems in proving the uninsured status of the tortfeasor's vehicle. The plaintiffs' son was killed while riding as a passenger in a vehicle driven by Sherly. Sherly's father, who worked on a barge and spent considerable time outside the continental United States, owned the vehicle. Sherly and his mother both testified at the trial that the vehicle was uninsured but admitted on cross examination that they could not say firsthand that the father had not purchased insurance.[293]

The supreme court found the verdict in favor of plaintiff to be against the weight of the evidence on the issue of the uninsured status of the vehicle. Distinguishing *Stewart*, the court found that the testimony of Sherly and his mother and the reasonable inferences derived therefrom were sufficient to with-

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[289] *Id.* at 725.

[290] *Id.* Chief Justice Gillespie and Justice Walker joined Justice Sugg's dissenting opinion. *Id.*

[291] *Id.* at 726.

[292] 337 So. 2d 711 (Miss. 1976).

[293] *Id.* at 711-12.

stand a request for a peremptory instruction on the issue. The court thus remanded the case for a new trial, rather than dismissing it with prejudice.[294]

In 1979, the supreme court, in *State Farm Fire & Casualty Co. v. Magee*,[295] addressed the problem of proving the tortfeasor's uninsured status when the tortfeasor is deceased. Magee was killed while riding as a passenger in an automobile driven by Richard, a resident of Illinois, who was also killed in the collision. The administrator of Richard's estate in Mississippi testified that he had conducted an independent investigation to determine whether Richard had liability insurance on his vehicle. His investigation revealed that no liability insurance covered the vehicle at the time of the wreck. The defendant insurance company objected to the administrator's testimony as hearsay, and, therefore, inadmissible on the basis of the *Stewart* decision.[296] The court distinguished the testimony of the administrator concerning his investigation from that of the plaintiff's attorney in *Stewart*.[297] The administrator had acted under a legal duty to collect the assets of Richard's estate. Since this task required him to investigate the possibility of the existence of liability insurance, the court concluded that even if his testimony regarding Richard's uninsured status was hearsay, it was admissible as an exception to the hearsay rule; it was the only evidence available since the uninsured motorist was dead.[298] The court noted that plaintiffs in an uninsured motorist case must attempt to prove a difficult negative: the absence of effective insurance.[299] In such a case, the court stated, "[T]he proof must be merely sufficient to convince the jury all reasonable efforts were made to determine the existence of such evidence; and that no insurance was discovered."[300] The court ruled that proof that an administrator's or executor's investigation revealed no effective

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[294] *Id.* at 712-13.

[295] 368 So. 2d 230 (Miss. 1979).

[296] *Id.* at 231-32.

[297] *Id.* at 232.

[298] *Id.*

[299] *Id.* (citing State Farm Mut. Auto. Ins. Co. v. Matlock, 462 S.W.2d 277, 278 (Tex. 1970)).

[300] 368 So. 2d at 232.

insurance was sufficient to establish a prima facie case. To hold otherwise, the court noted, would prevent a plaintiff from proving a case against a deceased tortfeasor.[301] The court also held that interrogatories propounded to the nonresident tortfeasor's widow were competent and admissible as proof of the tortfeasor's uninsured status.[302]

In *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.*,[303] the question of the sufficiency of the plaintiff's evidence that the tortfeasor was uninsured arose with the carrier's motion for a directed verdict.[304] The court of appeals concluded that the jury could reasonably have found the vehicle involved to be uninsured. The driver of the vehicle testified that he did not own the vehicle, that the owner had died two years before the wreck, and that the automobile had been abandoned at a third person's house for at least six months. The driver further testified that he carried no insurance on the car and knew of no one who did. The court held this evidence, when coupled with the plaintiff's unsuccessful attempts to find insurance on the vehicle, sufficient to support the jury's finding that the vehicle was uninsured and that the tortfeasor was an uninsured motorist.[305]

In 1981, the Mississippi Legislature came to the aid of the injured party with regard to the problem of proof of the tortfeasor's uninsured status and enacted legislation providing that certain evidence constituted prima facie proof of the uninsured status of an owner and operator of a vehicle involved in an accident.[306] The new law specifies that in any action to enforce a claim under the uninsured motorist provisions of an automobile liability policy, the following evidence is admissible as prima facie proof that the vehicle was uninsured:

(1) Affidavits from the owner and the operator of the

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[301] *Id.*

[302] *Id.* at 233.

[303] 582 F.2d 984 (5th Cir. 1978).

[304] *Id.* at 989. In diversity cases in the Fifth Circuit, a federal, rather than a state, test applies in determining the sufficiency of the evidence for submitting a case to the jury. Boeing Co. v Shipman, 411 F.2d 365, 368 (5th Cir. 1969).

[305] *Id.* at 989-90.

[306] Act of March 18, 1981, ch. 361, 1981 Miss. Laws 804 (codified at MISS. CODE ANN. § 13-1-124 (Supp. 1981)).

alleged uninsured vehicle attesting that they did not have automobile liability insurance covering the vehicle on the date of the collision;

(2) An affidavit by the Commissioner of Public Safety that on the date of the accident, neither the owner nor the operator, if residents of Mississippi, had in effect automobile liability insurance policies as determined by reports filed with the Safety Responsibility Bureau;

(3) An affidavit by the plaintiff that, to his knowledge, the owner and the operator of the vehicle were nonresidents of Mississippi or were citizens of a foreign country, and neither had in effect any policy of automobile liability insurance covering the vehicle, together with an affidavit to the same effect from the head of the appropriate agency in the tortfeasor's resident jurisdiction.[307]

The statute provides that the effect of this evidence is to shift the burden of proof of the tortfeasor's uninsured status from the plaintiff to the insurer.[308] The statute assists the injured plaintiff in uninsured motorist actions with his burden of proving the tortfeasor's uninsured status. This statute, like the ruling of the supreme court in *Magee,* helps to effectuate the purpose of the Mississippi Uninsured Motorist Act and ensures that the benefits of the Act are not, as a practical matter, voided by an unbearable burden of proof.

G. Other Procedural Considerations

Another consideration that counsel for an injured insured must be aware of is the statute of limitations. The action against an uninsured motorist carrier is a contract action governed in Mississippi by a six-year statute of limitations.[309] Since unin-

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[307] MISS. CODE ANN. § 13-1-124(1)(a)-(c) (Supp. 1981).

[308] *Id.* § 13-1-124(2).

[309] *See id.* § 15-1-49 (1972) (providing that actions with no prescribed period of limitation shall be commenced within six years after cause of action accrued); *see also* Cummings v. Cowan, 390 F. Supp. 1251, 1254 (N.D. Miss. 1975) (in diversity action by insured against alleged tortfeasor, Mississippi's six-year statute of limitations controlled).

sured motorist insurance has been in existence in Mississippi for almost fifteen years, many early uninsured motorist claims now may be barred by the six-year statute. But this is not always the case, even if the accident occurred more than six years ago. Where the case involves a death and the wrongful death beneficiaries include minors, the action on behalf of the minors may still be viable, since the statute of limitations does not begin to run against a minor until he reaches majority.[310] If a minor's parent died in the early days of uninsured motorist coverage in Mississippi as a result of the negligence of an uninsured motorist, the minor may still have a valid claim.

Another consideration often present in uninsured motorist cases is the conflict of laws question.[311] The same increased mobility that gave rise to the need for uninsured motorist insurance is partially responsible for the increased number of conflict of laws questions.

Each state's general conflicts rules apply in its uninsured motorist cases. In Mississippi, the "center of gravity," or "most substantial contacts," test determines what state's laws apply to the case.[312] Thus, where the action is brought by an injured Mississippi plaintiff on a policy of insurance issued pursuant to the Mississippi Act, the substantive law of Mississippi governs, even though the collision may have occurred outside of Mississippi.[313]

Other considerations in uninsured motorist cases include the defenses available to the insurance company. These include not only defenses relating to the coverage or provisions of the policy, but also any defenses that would be available to the negligent motorist. In *Aitken v. State Farm Mutual Automobile Insurance Co.*,[314] for example, the plaintiff's claim against the negligent motorist was barred by interspousal immunity.[315] The plaintiff's claim against the insurance carrier, therefore, was also

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[310] MISS. CODE ANN. § 15-1-59 (1972).

[311] For an analysis of conflict of laws issues in an uninsured motorist case, see Cummings v. Cowan, 390 F. Supp. 1251 (N.D. Miss. 1975).

[312] Mitchell v. Craft, 211 So. 2d 509, 516 (Miss. 1968).

[313] Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 433 n.1 (N.D. Miss.), *aff'd mem. per curiam*, 539 F.2d 574 (5th Cir. 1976).

[314] 404 So. 2d 1040 (Miss. 1981).

[315] *Id.* at 1043.

barred. The court held that it was not intended for the insured to be granted greater rights against the carrier than she would have enjoyed against the uninsured tortfeasor.[316] Thus, the insurance carrier has available to it any substantive defenses that would have been available to the uninsured tortfeasor.

VI. Damages

Under his uninsured motorist policy, an injured plaintiff is entitled to recover "all sums which he shall be legally entitled to recover as damages for bodily injury or death" from the uninsured tortfeasor.[317] Such damages include those for present and future medical expenses, pain and suffering, loss of income, loss of wage-earning capacity, disability, and any other damages that would have been recoverable in a personal injury action against the uninsured motorist. In wrongful death cases the damages include, in addition to all damages that would have been recoverable by a decedent had he lived, loss of support and maintenance, loss of society and companionship, and loss of all the other tangible and intangible benefits of decedent's life for which damages are recoverable under the wrongful death statute.[318]

Mississippi law requires that interest be paid on judgments and decrees from the date of their entry.[319] An award on an uninsured motorist insurance policy must bear interest at least from this date.[320] Where there is no justifiable reason for the company's withholding payment of the uninsured motorist benefits, prejudgment interest may also be awarded. In *State Farm Mutual Automobile Insurance Co. v. Bishop,*[321] for instance, the supreme court affirmed an award by the trial court of prejudgment interest in an uninsured motorist case. The court con-

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[316] *Id.* at 1045.

[317] Miss. Code Ann. § 83-11-101(1) (Supp. 1981).

[318] United States Fidelity & Guar. Co. v. Pearthree, 389 So. 2d 109, 112 (Miss. 1980). For a discussion of damages recoverable in wrongful death actions, see Luckett & Thomas, *Wrongful Death Damages in Mississippi,* 43 Miss. L.J. 633 (1972).

[319] Miss. Code Ann. § 75-17-7 (Supp. 1981).

[320] *See* State Farm Mut. Auto. Ins. Co. v. Talley, 329 So. 2d 52, 56 (Miss. 1976) (reversing lower court for not allowing interest on judgment from date decree entered).

[321] 329 So. 2d 670 (Miss. 1976).

cluded that where a justifiable dispute exists as to the amount due, the insured is not entitled to interest until the amount due is liquidated.[322] Where the insurance company withholds payment of the liquidated uninsured motorist benefits under one policy in an attempt to obtain a release under another, the action of the company is arbitrary and unjustified, and an award of prejudgment interest is proper. Since an award of prejudgment interest is within the discretion of the trial court, the sole question on appeal is whether the trial court abused its discretion.[323]

In *Dunnam v. State Farm Mutual Automobile Insurance Co.*,[324] the supreme court clarified the *Bishop* rule by stating, "[W]hen an insurer has knowledge that its insured has suffered damages in excess of its uninsured motorist coverage as a result of the negligence of an uninsured motorist, and arbitrarily refuses payment, the insured is entitled to pre-judgment interest."[325]

The Mississippi Act requires the carrier to pay all sums that the injured party would be entitled to recover from the uninsured tortfeasor. The Mississippi Supreme Court has not addressed the question of whether the phrase "all sums" includes sums awarded as punitive damages against the tortfeasor. In early cases from other jurisdictions, it was held inappropriate to award punitive damages for the misconduct of the uninsured motorist against the uninsured motorist carrier.[326] Since the purpose of uninsured motorist coverage is to compensate for bodily injuries, courts reasoned that the punitive award was not justified. In the jurisdictions in which these early cases were decided the situation was remedied by legislative enactment specifically allowing the award of punitive damages in uninsured motorist cases.[327]

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[322] *Id.* at 673.

[323] *Id.*

[324] 366 So. 2d 668 (Miss. 1979).

[325] *Id.* at 672.

[326] *See* Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206, 210 (1964) (uninsured motorist statutes do not provide for payments of punitive damages).

[327] *See* S.C. CODE ANN. § 56-9-810(4) (Law. Co-op. 1976) (punitive damages recoverable pursuant to uninsured motorist statute).

The uninsured motorist statute of Virginia is nearly identical to that of Mississippi. In cases presenting questions of first impression regarding uninsured motorist insurance, the courts of Mississippi have looked for guidance to decisions interpreting the Virginia statute.[328] In Virginia, an award of punitive damages under the uninsured motorist statute has been upheld.[329] Virginia's uninsured motorist statute does not mention punitive damages. Rather, in language identical to Mississippi's statute, the Virginia statute requires that provisions of the uninsured motorist endorsement mandate payment to the insured "all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle."[330] In *Lipscombe v. Security Insurance Co.*,[331] the Virginia Supreme Court held that the legislature intended that this language include an award of punitive damages.[332]

The uninsured motorist carrier argued in *Lipscombe* that to require it to pay punitive damages in an uninsured motorist case would thwart the purpose of discouraging wrongdoing. The Virginia court rejected this argument by citing language from the Virginia statute's subrogation provision, which provided that the company paying such a claim is subrogated to the rights of the injured party against the person "causing such injury, death or damage."[333] The quoted language from the Virginia uninsured motorist subrogation provision is identical to that found in the Mississippi Act.[334] *Lipscombe* and subsequent cases in Virginia allowing an award of punitive damages in uninsured motorist cases are persuasive authority for an award of punitive damages under the Mississippi Act.

Under Mississippi law, the refusal of an uninsured motorist

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[328] *See* Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 433 (Miss. 1973) (citing Virginia case regarding notice requirement of uninsured motorist statute).

[329] *See* Lipscombe v. Security Ins. Co., 213 Va. 81, 189 S.E.2d 320, 323 (1972) (construing "all sums" language in uninsured motorist statute to include award of punitive damages).

[330] VA. CODE § 38.1-381(b) (1981).

[331] 213 Va. 81, 189 S.E.2d 320 (1972).

[332] 189 S.E.2d at 323.

[333] *Id.* at 323-24 (emphasis omitted).

[334] *See* MISS. CODE ANN. § 83-11-107 (1972) (subrogation provision). See *supra* note 273 for the pertinent language of § 83-11-107.

insurance carrier to pay a claim with no legitimate or arguable reason for such refusal may subject the carrier itself to punitive damages, in addition to those awarded against the negligent motorist. In the absence of a justifiable reason, such refusal may be deemed an intentional wrong and an independent tort giving rise to punitive damages. In *Black v. Fidelity & Guaranty Insurance Underwriters, Inc.*,[335] the Fifth Circuit remanded an uninsured motorist case for a jury determination of punitive damages for the company's refusal to pay the claim.[336] In *Aitken v. State Farm Mutual Automobile Insurance Co.*,[337] on the other hand, a justifiable reason existed for the company's refusal to pay the claim and punitive damages were deemed improper.[338]

Conclusion

The attorney for an injured party in potential uninsured motorist cases should keep in mind the broad scope of uninsured motorist law in Mississippi. The liberal interpretation of the Mississippi Act renders coverage for many otherwise noncompensible injuries suffered by responsible Mississippi motorists and their families.

The scope and amount of uninsured motorist coverage must always be viewed in light of the controlling rules of construction of uninsured motorist law in Mississippi. First, the purpose of uninsured motorist protection is to provide a means of recompense for an injured party, and its provisions are liberally construed to accomplish this purpose. Second, ambiguous policy provisions are construed in favor of an injured party. Third, while the policy may expand the coverage required by the Act, it cannot reduce such coverage. Finally, where the terms of the policy conflict with the requirements of the statute, the statute controls. These general rules of construction have played a vital role in providing insurance protection to thousands of injured Mississippians.

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[335] 582 F.2d 984 (5th Cir. 1978).
[336] *Id.* at 991.
[337] 404 So. 2d 1040 (Miss. 1981).
[338] *Id.* at 1045.

The Act is a classic example of the successful interworkings of the legislative and judicial branches of state government for the protection and benefit of the citizens of the state. Adopted after careful consideration, the Act has been periodically amended and improved by the legislature as the need arose to provide better protection for injured parties. During the fifteen years since the Act's adoption, the courts have interpreted the Act to effect meaningfully its purpose. The Mississippi Supreme Court has consistently applied and interpreted the provisions of the Act to provide effectively a means of recompense to those unfortunate individuals injured by financially irresponsible motorists.

Uninsured motorist law in Mississippi is not a static creature; it is a viable expanding body of law growing and changing as necessary. The insurance industry, the legislature, the courts, and advocates for both plaintiffs and defendants have all contributed to the continuing success of uninsured motorist insurance. It is hoped that this article will cause the practitioner to consider the varied occasions in which uninsured motorist coverage may be beneficial to his clients and that the article may serve as a point of future reference as Mississippi practitioners apply the Uninsured Motorist Act and the decisions thereunder to the avail of the citizens of Mississippi.

SEAMEN'S REMEDIES—AN ANALYSIS

*Frank S. Thackston, Jr.**

Introduction and Disclaimer

This article discusses theories of potential recovery available to "seamen"[1] injured, killed, or rendered ill during the course of maritime employment.

Analysis of "seamen's" remedies against "shipowners" involves consideration of numerous concepts of law, some of which, standing alone, would be fertile subjects for a paper such as this. This article, however, does not undertake to deal comprehensively with any particular legal proposition here mentioned. This paper is written for the benefit of the non-admiralty practitioner, or judge, who desires to acquire a general, beginning, albeit superficial, "feel" for this area of the law. Accordingly, rather than examining a few subjects in depth, this article will discuss, in a very general manner, a rather large number of separate topics. Moreover, emphasis has here been placed on major concepts of law established by United States Supreme Court or by Fifth Circuit Court of Appeals precedent, rather than exceptions to, or distinctions in, those doctrines determined by other courts.

A "seaman's" suit for personal injury against a "shipowner" (who may or may not be the "seaman's" employer) can be predicated on three basic doctrines. They are: (1) unseaworthiness;

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[1] Within the purview of this paper "seamen" principally include those persons who are employed on vessels as regular crew members. Remedies available to persons who are not actual vessel crew members but who are nonetheless afforded traditional seamen's remedies are also discussed. Rights of land-based maritime workers such as longshoremen are here included only to the extent that those workers are entitled to the benefits of "true" seaman's remedies.

"Shipowners" as used in this article include those persons or entities who own, operate, or charter, maritime equipment or structures and who by virtue of such ownership or involvement are liable to "seamen" for illness, injury, or death.

(2) negligence as prescribed by the "Jones Act"; and (3) maintenance and cure. Discussion of these three basic maritime doctrines will follow. The shipowner's warranty of seaworthiness will be examined initially, with Jones Act negligence and maintenance and cure to follow in that order. The final section of this paper examines seamen's death actions as provided by the Jones Act, the Death on the High Seas Act, and the doctrine of seaworthiness.

I. The Shipowner's Warranty of Seaworthiness

A. A Preliminary Observation

There is rarely an instance in which a seaman is injured or killed during the course of maritime employment where the facts and circumstances surrounding the involved accident will not support a viable, potentially sellable, unseaworthiness claim. One need only examine the remarkable success that seamen-litigants have enjoyed in the prosecution of their unseaworthiness suits to reach this conclusion. To say that seamen usually win unseaworthiness battles is an accurate report of maritime personal injury litigation box scores.

Sound policy reasons, repeatedly mentioned in maritime jurisprudence, account in part for this lopsided won/lost record. Seamen were declared long ago to be the wards of the admiralty courts.[2] Indeed, the guardians of these wards, the admiralty courts, have more than adequately discharged their fiduciary obligations. The discussion that follows will demonstrate how favorable the unseaworthiness remedy is to seamen who utilize it.

B. Definitions

Seamen, and those persons doing work traditionally that of

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[2] *See, e.g.*, Kenny v. California Tanker Co., 381 F.2d 775, 777 (3d Cir. 1967) (well settled that seamen are wards of admiralty), *cert. denied*, 390 U.S. 904 (1968); Putman v. Lower, 236 F.2d 561, 569 (9th Cir. 1956) (same). In Harden v. Gordon, 11 F. Cas. 480 (C.C. Me. 1823) (No. 6047), Justice Story observed: "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel . . . . They are emphatically the wards of admiralty. *Id.* at 485.

seamen,[3] alone are given the right to sue for a shipowner's breach of the warranty of seaworthiness. Shipowners, persons or corporate entities who actually own vessels and employ seamen to work on them, are obviously liable for breaches of the warranty of seaworthiness. If a shipowner rents a vessel to another (in maritime jargon such a rental agreement is called a "charter"), the charterer (the person renting the vessel), can, by law, assume the unseaworthiness liability of the vessel owner for injury or death occurring during the charter term.[4] The term "shipowner," therefore, in terms of who is liable to seamen for breaches of the warranty of seaworthiness, can, and often does, include either the vessel's actual owner or its charterer, or both of them. A detailed discussion of charter party unseaworthiness liability as between a vessel owner and charterer is beyond the scope of this paper. It may suffice, however, to mention that contractual relationships between vessel owners and third parties can affect a vessel owner's liability. Such contracts also can impose unseaworthiness liability upon third parties.

The many different types of crafts and structures judicially declared to be "vessels" within the purview of the Jones Act, the warranty of seaworthiness, and the doctrine of maintenance and cure are identified in subsequent sections of this paper. At this juncture, it should be noted that "vessels" themselves can be potentially liable to seamen for some, though not all, types of maritime torts. This is possible by resort to the fiction that a "vessel"

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[3] In Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), the Court extended the warranty of seaworthiness to longshoremen working on a vessel, since longshoremen supposedly incurred the risks of a seaman. *Id.* at 96-97. Subsequent cases made it clear that persons other than true seamen and longshoremen could look to this remedy for recovery. *See infra* notes 53-70 and accompanying text. The 1972 amendments to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-950 (1976), statutorily overruled *Sieracki* by providing that the warranty of seaworthiness was no longer available to longshoremen and other workers within the coverage of the Act. The amended Act, however, removes the protection of the warranty of seaworthiness only to longshoremen, that is, persons covered by the Act itself. Persons other than "longshoremen" likely have retained the protection previously provided by *Sieracki*. The term "seamen" therefore would include those people. *See infra* notes 101-108 and accompanying text (tests for determining seaman status).

[4] An injured seaman can sue and recover from a vessel's charterer if an employment relationship can be shown. *See* Reed v. Steamship Yaka, 373 U.S. 410, 412-13 (1963) (barring explicit statutory exemption, charterer personally liable for unseaworthy vessel).

is a separate person in the eyes of the maritime law and, as such, can incur liability.[5] Enforcement of a vessel's "personal" liability can be accomplished by suing the vessel itself in rem or by suing her owner or charterer in personam, or by combining an in rem suit against an offending vessel with an in personam suit against her owner or charterer.

It is well-established that the seaman has a right to proceed both in rem and in personam for injuries received as a result of the unseaworthiness of his vessel[6] and also has a right to maintenance and cure.[7] A seaman does not, however, have the right to sue in rem for an action based solely on the Jones Act,[8] but this limitation on the right to sue in rem is easily avoided by simply joining a Jones Act claim with an action for unseaworthiness and maintenance and cure.

As stated, an action in rem is against the vessel, not against her owner, and in rem jurisdiction is strictly geographical.[9] It depends absolutely on the in rem defendant-vessel being physically within the geographical limits of the court's jurisdiction. In rem jurisdiction is obtained by filing an in rem complaint, by having the clerk issue a warrant for the arrest of the offending vessel, by having that warrant served and the vessel "arrested," and by having the vessel placed in the custody of the marshal or his substituted custodian.[10] Once physical possession of the vessel itself is established, the arresting court acquires jurisdiction over the merits of the in rem claim. A shipowner who desires release of his arrested vessel must post, with the arresting court, secur-

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[5] *See* The China, 74 U.S. (7 Wall.) 53, 55 (1868) (collision impressed maritime lien on vessel); The Big Malek Adhel, 43 U.S. (2 How.) 210, 212-14 (1844) (government seized vessel to prevent piracy committed without privity of owner). *See generally* Note, *Personification of Vessels,* 77 HARV. L. REV. 1122, 1123-28 (1964).

[6] *See, e.g.,* The Osceola, 189 U.S. 158, 175 (1903) (vessel liable for injuries received in consequence of unseaworthiness).

[7] *Id.; see* The Montezuma, 19 F.2d 355-56 (2d Cir. 1927) (seaman has right to maintenance and cure in case of personal injury; this becomes a lien on vessel).

[8] Plamals v. The Pinar Del Rio, 277 U.S. 151, 156 (1928). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 625 n.86 (2d ed. 1975).

[9] Admiralty in rem actions are maintainable only in the federal courts. The Hine v. Trevor, 71 U.S. (4 Wall.) 555, 563-71 (1867); The Moses Taylor v. Hammons, 71 U.S. (4 Wall.) 411, 425-31 (1867).

[10] *See* FED. R. CIV. P. C (Supplemental Rules for Certain Admiralty and Maritime Claims) (provisions for action in rem).

ity, which is substituted for the res, the vessel.[11]

The term "seaworthiness" itself has undergone little change since it was first employed in a suit in which recovery for cargo damage was sought. In that action, the test for determining seaworthiness was stated to be "whether the vessel was reasonably fit to carry the cargo undertaken to transport."[12] As applied to an item of alleged defective ship's equipment, the test is whether the device in question was adequate at the time of injury or death for the purpose for which it was ordinarily to be used.[13] Seaworthiness of ship's personnel involves an inquiry as to whether the seaman in question was equal in disposition and seamanship to the ordinary men of the calling.[14]

The Fifth Circuit Court of Appeals has suggested that a vessel is seaworthy if it is "fit in the eyes of the law for the life and limb of those who go down to the sea in ships."[15] Another Fifth Circuit decision indicates that "seaworthiness . . . means that under the circumstances existing at the time of the injury, the vessel and her equipment . . . were reasonably fit to perform the duty with safety, which this vessel owed to human beings aboard her, and to perform duties for which they were intended."[16]

One of the most frequently cited cases undertaking to define the warranty of seaworthiness is the Supreme Court's decision in *Mitchell v. Trawler Racer, Inc.*[17] Because of the importance of this decision,[18] it will be discussed in some detail. Mitchell was a crew member on the fishing trawler Racer. After completion of the vessel's voyage, and at a time when the Racer was in port, slime accumulated on the ship's rail during the process of un-

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[11] *See id.* E(5)(a) (posting of security).

[12] The Silvia, 171 U.S. 462, 464 (1898). The concept of unseaworthiness is broad enough to include almost all types of operating negligence in the management and navigation of the ship. *See* Chamlee, *The Absolute Warranty of Seaworthiness: A History and Comparative Study*, 24 MERCER L. REV. 519, 520-28 (1973) (scope of unseaworthiness).

[13] Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944).

[14] Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 337 (1955).

[15] Walker v. Harris, 335 F.2d 185, 190 (5th Cir. 1964).

[16] Vickers v. Tumey, 290 F.2d 426, 433 n.5 (5th Cir. 1961).

[17] 362 U.S. 539 (1960).

[18] *See* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 21 (3rd ed. 1979) (most informative case in years); G. GILMORE & C. BLACK, *supra* note 8, at 402 (decision seemed to be last word in seaworthiness cases).

loading the ship's fish catch. While attempting to leave the vessel, Mitchell fell and was injured when his foot slipped on the accumulated slime. This accident formed the basis of Mitchell's suit in which he asserted, in part, that the slime's presence on the ship's rail rendered the Racer unseaworthy.[19]

The district court correctly charged the jury that, under the Jones Act, negligence on the part of the shipowner had to be proven.[20] The court further charged that before the jury could find the Racer unseaworthy, the jury would have to conclude that the shipowner had been negligent in permitting the accumulated material to remain on the rail for an unreasonably long period of time. The jury returned a verdict for the shipowner on both the negligence and unseaworthiness counts, and Mitchell appealed.[21]

Relying on earlier decisions that established that "the duty to provide a seaworthy ship depends not at all upon the negligence of the shipowner or his agents,"[22] and on the premise that the duty to supply a seaworthy vessel was absolute,[23] the Supreme Court ruled that the trial court's instructions dealing with the warranty of seaworthiness were erroneous.[24] The Court reaffirmed its earlier pronouncements that unseaworthiness is "a species of liability without fault" and that the doctrine is not limited by conceptions of negligence.[25] The Court then undertook to state what unseaworthiness was *not*, namely:

> What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of

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[19] 167 F. Supp. 434, 434 (D. Mass. 1958), *aff'd*, 265 F.2d 426 (lst Cir. 1959), *rev'd*, 362 U.S. 539 (1960).

[20] 167 F. Supp. at 434.

[21] *Id.*

[22] Mahnich v. Southern S.S. Co., 321 U.S. 96, 100-02 (1944); *see infra* notes 30-36 and accompanying text.

[23] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95 (1946); *see infra* notes 37-41 and accompanying text.

[24] 362 U.S. at 550.

[25] *Id.*

> the sea, but a vessel reasonably suited for her intended service.[26]

The *Mitchell* Court, therefore, ruled that the standard of seaworthiness owed by a shipowner was not perfection but "only" reasonable fitness. As an abstract proposition, *Mitchell*'s definition is clear and should be easy to apply. In practice, however, to say that "perfection" is not required but that "reasonable fitness" is, does little to resolve whether the vessel itself, its crew, or the particular item of equipment in question is seaworthy or unseaworthy.

The Fifth Circuit has advanced the following test for determining seaworthiness:

> The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: What is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful or prudent the owner might have been.[27]

Seaworthiness, therefore, is a relative term.[28] A vessel may be seaworthy for one type of service or purpose and unseaworthy for another. For example, a vessel without a handrail for crew members to hold onto may be seaworthy for operation in calm waterways, but unseaworthy in turbulent seas.[29]

The foregoing pronouncements provide insight as to what seaworthiness is, and the Court's language in *Mitchell* indicates what seaworthiness is not. These definitions, however, do not necessarily advise when unseaworthiness exists. A review of the judicial evolution of this doctrine is perhaps the best way of get-

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[26] *Id.*

[27] Walker v. Harris, 335 F.2d 185, 191 (5th Cir. 1964).

[28] *E.g.*, Gibbs v. Kiesel, 382 F.2d 917, 918 (5th Cir. 1967) (a relative concept); Vickers v. Tumey, 290 F.2d 426, 433 (5th Cir. 1961) (relative term depending on circumstances).

[29] Newport News Shipbuilding & Dry Dock Co. v. Watson, 19 F.2d 832, 833 (4th Cir. 1927).

ting a "feel" for how courts usually resolve the question of seaworthiness.

C. *The Development of the Doctrine*

1. Unseaworthiness—The Shipowner Absolutely Warrants the Fitness of the Ship's Gear

In 1944, the Supreme Court began what leading commentators have described as a "revolution in the law."[30] The decision generating this judicial revolt was *Mahnich v. Southern Steamship Co.*[31] In this landmark case, Mahnich, a seaman, was injured when a piece of defective rope used to secure a platform called a staging broke. The staging fell, causing Mahnich's injury. Mahnich sued, claiming that the presence of the defective rope rendered the vessel unseaworthy. There was sound rope aboard Mahnich's vessel that was available to secure the staging; the vessel's mate, however, selected the defective rope. Mahnich's injury was said to have been "attributable to the negligence of the . . . mate in failing to observe the defect."[32]

Dismissing Mahnich's unseaworthiness suit, the lower court reasoned that the shipowner, by having available non-defective rope, complied with the obligation to furnish a seaworthy vessel. In the lower court's opinion, the mate's negligent act of selecting defective rope did not render Mahnich's vessel unseaworthy.[33] The Supreme Court reversed and declared that the shipowner's obligation to furnish a seaworthy ship was absolute, was not predicated on negligence, and was not satisfied by a showing that the shipowner used due diligence.[34]

Since the staging from which Mahnich fell was supported by a defective rope, the vessel was unseaworthy, and "[a]ny negligence of the mate in selecting the rope and ordering its use as a part of the staging, or of the boatswain in using it for that pur-

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[30] G. GILMORE & C. BLACK, *supra* note 8, at 384.

[31] 321 U.S. 96 (1944).

[32] 45 F. Supp. 839, 840 (E.D. Pa. 1941), *aff'd*, 135 F.2d 602 (3d Cir. 1943), *rev'd*, 321 U.S. 96 (1944).

[33] 45 F. Supp. at 840.

[34] 321 U.S. at 100-03.

pose, could not relieve [the shipowner] of the duty to furnish a seaworthy staging." The fact that the shipowner had furnished sound rope to its crew, who chose not to use it, afforded no defense because the shipowner was found to warrant absolutely the fitness of ship's gear.[35] Under *Mahnich,* the shipowner is liable for injury caused by ship's gear that is not reasonably fit, regardless of the reason for such unfitness.[36]

In *Seas Shipping Co. v. Sieracki,*[37] the Supreme Court again considered the shipowner's obligation to furnish a seaworthy vessel. Sieracki, a longshoreman,[38] operated a winch and was injured when a shackle that supported the winch's boom broke, causing the boom to fall. A manufacturing defect in the shackle's forging caused the failure, and visual inspection of the device by the ship's crew would not have disclosed the defect.[39]

Sieracki charged unseaworthiness in his complaint against the shipowner. The lower courts erroneously ruled that the vessel was seaworthy because the shipowner had no affirmative duty to discover unknown and latent defects in the ship's equip-

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[35] *Id.*

[36] As a matter of historical interest, 16 years before *Mahnich,* the Supreme Court decided Plamals v. The Pinar Del Rio, 277 U.S. 151 (1928). In *Plamals,* like *Mahnich,* the suit was based upon an injury to a seaman sustained in a fall from a staging that had collapsed when a defective piece of rope supporting it parted. Moreover, in *Plamals,* the vessel's mate selected the defective rope and sound rope was available. *Id.* at 153. The Court ruled: "The record does not support the suggestion that the 'Pinar del Rio' was unseaworthy. The mate selected a bad rope when good ones were available." *Id.* at 157. Thus, on virtually identical facts, the vessel in *Plamals* was declared to be seaworthy, while the vessel in *Mahnich* was declared unseaworthy. Indeed, the Court's action in *Mahnich* in overruling *Plamals,* since the facts were virtually identical, could be categorized as "revolutionary." Such a ruling more accurately evidences a judicial tendency to expand the scope of the unseaworthiness warranty.

[37] 328 U.S. 85 (1946).

[38] Longshoremen customarily load and unload ships and generally are employed by independent contractors, called stevedores. *Sieracki* extended the warranty of seaworthiness to these workers even though they are not members of the shipowner's vessel's crew. This aspect of the *Sieracki* decision is discussed subsequently in more detail. *See infra* notes 54-56 and accompanying text. Since *Sieracki* conferred an unseaworthiness remedy upon longshoremen, they often are called "*Sieracki*-seamen." This class of worker, as will subsequently appear, has played a major role in shaping the doctrine of unseaworthiness.

[39] 328 U.S. at 85-86. Traditional shore-side product liability concepts such as breach of warranty and strict liability in tort are recognized in admiralty. *See, e.g.,* Jig the Third Corp. v. Puritan Marine Ins. Underwriters Corp., 519 F.2d 171, 174 (5th Cir. 1975).

ment.[40] The Supreme Court unanimously corrected this error by holding that the shipowner had breached its warranty of seaworthiness owed to Sieracki.[41]

In both *Mahnich* and *Sieracki,* the shipowners were deemed to have warranted absolutely the fitness of their ships' gear. These cases teach that defective ship's equipment that causes or contributes to a seaman's injury or death renders a vessel unseaworthy and the vessel owners liable, regardless of whether the defect was discoverable by a vessel owner exercising reasonable care. The Court in *Sieracki* ruled that the warranty is not limited to patent equipment defects, that is, those capable of being discovered, but extended to latent ones. The patent or latent nature of the defect is therefore relevant to whether it was discoverable on reasonable inspection for the purpose of determining negligence, but is irrelevant on the issue of the vessel's unseaworthiness.

In *Crumady v. The Joachim Hendrick Fisser,*[42] the *Mahnich/Sieracki* rule was again applied to an injury caused by an item of ship's equipment. The device at issue, however, was in perfect operating condition. Crumady, a longshoreman, was injured by a falling boom that was part of the vessel's unloading gear. The boom was designed to carry a three-ton load and was equipped with a "breaker," a safety device that rendered the boom inoperative whenever the three-ton load limit was exceeded. Before relinquishing control of the vessel to Crumady's employer, the ship's crew set the circuit breaker to operate only when a six-ton load was carried. The boom fell and injured Crumady when a load of more than three tons (but presumably less that six tons) was lifted.[43] The Supreme Court ruled that this misuse of seaworthy equipment rendered the vessel unseaworthy.[44]

Crumady, like *Mahnich* and *Sieracki,* held that defective ship's gear that produces injury or death to seamen imposes unseaworthiness liability. It is no defense to assert that the defects

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[40] 328 U.S. at 87.
[41] *Id.* at 103.
[42] 358 U.S. 423 (1959).
[43] *Id.* at 425-26.
[44] *Id.* at 428.

were not discoverable, since a finding of unseaworthiness is not predicated on negligence. To argue that fit equipment was supplied, but later rendered unfit by others, likewise affords no excuse, since the shipowner's obligation to supply reasonably fit gear is absolute and nondelegable.[45]

At this juncture an important limitation on the rule discussed above should be noted. A seaman who creates a condition of unseaworthiness, and is injured as a result, cannot recover. In the context of injury caused by a ship's defective equipment, the Fifth Circuit has ruled:

> We recognize that a shipowner has been held liable under the doctrine of unseaworthiness even where he supplied a seaworthy vessel and proper appliances and crew, but an officer or crew member negligently rigged a device or appliance so as to render it temporarily unseaworthy *and another crew member was injured* . . . . What we are unwilling to here announce or apply is a new variation of that rule which would allow recovery for a condition of temporary unseaworthiness *deliberately* brought about without the shipowner or captain's knowledge, by the same seaman who then injures himself upon the very defect he intentionally creates. Under these circumstances the owner did not, as a matter of law, violate his absolute duty to provide a seaworthy vessel.[46]

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[45] Misuse of even non-defective, otherwise seaworthy equipment may nevertheless create an unseaworthy condition. Allen v. Seacoast Prods., Inc., 623 F.2d 355, 360-61 (5th Cir. 1980). In *Allen,* attempting to move a partially submerged shrimp-boat with an inch and one-quarter mooring line constituted unseaworthiness, although the line may have been seaworthy for its usual functions. *Id.* at 361; *see* Gibbs v. Kiesel, 382 F.2d 917, 919 (5th Cir. 1967) (failure of cable during ordinary use indicates defective condition as matter of law); Varlack v. Mitsui O.S.K. Lines, 333 F. Supp. 1233, 1235 (E.D. Pa. 1971) (cargo exceeded capacity of rigging used to raise it); *see also* Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464, 468-69 (5th Cir.) (cable spliced improperly), *cert. denied,* 387 U.S. 908 (1966).

The duty to maintain the ship's equipment in proper operating condition can in some circumstances be breached by transitory, as well as permanent, defects in such equipment. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960). Even a temporary and unforeseeable malfunction of a piece of equipment under proper and expected use is sufficient to establish unseaworthiness. *See* Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 499 (1971) (unseaworthy where proximate cause of injury).

[46] Little v. Green, 428 F.2d 1061, 1067 (5th Cir. 1970) (citations and footnote omitted) (emphasis added).

There is authority for the proposition that equipment that fails and causes injury while being used as intended, produces unseaworthiness liability.[47] In fact, many cases have held that equipment failure during customary usage gives rise to a presumption of unseaworthiness that, unless rebutted by the shipowner, will support an unseaworthiness finding.[48]

Several additional comments are in order concerning defective equipment that renders a vessel unseaworthy. *Crumady*, as stated, established the proposition that misuse of seaworthy equipment can impose unseaworthiness liability. Likewise, lower courts have ruled that a shipowner's failure to require use of safety equipment[49] or failure to supply or to have available[50]

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[47] In Gibbs v. Kiesel, 382 F.2d 917 (5th Cir. 1967), a seaman was injured when the wooden "doors" of a shrimp net fell on him. There was no evidence explaining why the doors fell, although it was clear that at the time of the accident they were being put to their ordinary, intended use. The shipowner contended that the absence of any affirmative proof demonstrating a defect in the doors precluded a finding of unseaworthiness. The jury agreed, rejecting the seaman's negligence and unseaworthiness claims and finding for the shipowner. *Id.* at 918.

On appeal, the court reversed, finding that as a matter of law the falling doors made the vessel unseaworthy. The failure of the doors was, without other proof, sufficient to command a finding of unseaworthiness even in the face of a contrary jury verdict. The court stated: "Likewise, we believe, it is of no real significance how or why the 'doors' fell. The fact that they fell during ordinary intended use indicates a defective condition; therefore rendering [the vessel] unseaworthy as a matter of law." *Id.* at 919.

[48] A classic and often cited decision on this point is Walker v. Harris, 335 F.2d 185 (5th Cir. 1964). There, a vessel sunk under normal operating conditions; the sinking led to the deaths of two members of the crew. The contention was made that the vessel was presumptively unseaworthy. *Id.* at 187. The court agreed:

> This analysis brings us, therefore, to the application of the familiar doctrine, so often envoked where vessels sink in calm waters, that sinking (*or other failure*) under circumstances and conditions which the vessel must reasonably anticipate and overcome is the best proof of, and makes out the classic case of unseaworthiness. Although not articulated in such terms, it is a sort of seagoing *res ipsa loquitur*. Once it is assumed (or judicially held) that the vessel must anticipate the particular hazard and be staunch enough to override it, the only escape from the inference of unseaworthiness is proof that some new, unforeseen, intervening force or factor brought about the failure of ship or gear. There is none of that here.

Id. at 193 (emphasis added).

[49] *See* Weeks v. Alonzo Cothron, Inc., 466 F.2d 578, 582 (5th Cir. 1972) (failure to require use of lifelines).

[50] *See* Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 331 (1960) (worn wrench that slipped from nut and injured seaman rendered vessel unseaworthy); White v. Rimrock Tidelands, Inc., 414 F.2d 1336, 1339 (5th Cir. 1969) (shipowner failed to supply

safe tools can render a vessel unseaworthy.

While defective equipment or gear creates unseaworthiness, a shipowner is not obligated to supply the most modern or best equipment on the market at the time of injury.[51] As a practical matter, however, proof of the existence of better, safer, or more modern equipment is generally allowed to show that the equipment at issue is not reasonably fit.[52]

2. Unseaworthiness—Persons Other than True Seamen Are Entitled to the Protection Afforded by This Doctrine

As previously stated, *Sieracki* expanded the shipowner's seaworthiness warranty to latently defective equipment.[53] In so doing, *Sieracki* certainly must be regarded as an important decision in the jurisprudential development of the doctrine of seaworthiness. *Sieracki* also extended that warranty to a different class of persons: land-based workers who sustain injury while working aboard a vessel. *Sieracki* is literally famous for this aspect of the decision.

Sieracki was a longshoreman employed by a stevedoring firm under contract to the shipowner to load its vessel. While aboard the vessel and in the process of loading it, Sieracki sustained an injury as the result of defective ship's equipment. Sieracki was not an employee of the shipowner and was not a member of the vessel's crew. The Supreme Court defined the issue as being "*whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work* aboard but employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship."[54] Resolving this question in favor of the longshoreman, the Court

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rubber boots to seamen who had to work in caustic mud); Wilhelm Seafoods, Inc. v. Moore, 328 F.2d 868, 870 (5th Cir. 1964) (failure to supply adequate lifesaving equipment).

[51] The case most frequently cited for this proposition is Doucette v. Vincent, 194 F.2d 834, 838 (1st Cir. 1952). In Weeks v. Alonzo Cothron, Inc., 466 F.2d 578 (5th Cir. 1972), the court stated that the doctrine of seaworthiness did not require the vessel "to be equipped with the latest developments in maritime safety." *Id.* at 581.

[52] *See* Troupe v. Chicago, D & G. Bay Transit Co., 234 F.2d 253, 259-60 (2d Cir. 1956) (proof of safer equipment allowed).

[53] 328 U.S. at 94.

[54] *Id.* at 89 (emphasis added).

declared that such a worker was a seaman for purposes of the warranty of seaworthiness.[55]

Sieracki thus provided some land-based workers with a "no fault remedy": unseaworthiness. *Sieracki* held that the shipowner's warranty to provide a seaworthy vessel is owed not only to members of the ship's crew who are employees of the shipowner, but also to other workers.

Following *Sieracki,* persons other than crew members and longshoremen have obtained the benefit of this no fault remedy. In determining whether a person other than a seaman or longshoreman is entitled to the benefits of the doctrine of seaworthiness, a controlling factor is the character of the work being performed by the person in question. If the work is in the "ship's service," that is, work traditionally performed by vessel crew members, the seaworthiness doctrine is applicable.[56]

The Supreme Court applied the reasoning in *Sieracki* in *Pope & Talbot v. Hawn.*[57] Hawn, a carpenter employed to make minor repairs on grain doors on the shipowner's vessel, did not work for the shipowner and was not a member of its vessel's crew. He fell through an uncovered hatchway, was injured, and sued, claiming that the vessel was unseaworthy. The shipowner urged that *Sieracki* did not apply because Hawn was a carpenter, not a longshoreman, and was not engaged in loading cargo. The Court ruled that Hawn was indeed a *Sieracki*-seaman.[58]

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[55] The Court reasoned, in part:

> It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.

Id. at 99.

[56] See *infra* notes 67-70 and accompanying text for an explanation of the Longshoremen's and Harbor Worker's Compensation Act and its effect on the *Sieracki* doctrine.

[57] 346 U.S. 406 (1953).

[58] The Court reasoned that *Sieracki* and *Hawn* were indistinguishable as a matter of law:

> Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need

The *Hawn* ruling that a carpenter working aboard ship was entitled to sue a shipowner on the basis of the doctrine of seaworthiness settled the question of whether a person engaged in other ordinary ship's repair could avail himself of that doctrine. In *The M.C. Tungas v. Skougaard,*[59] an employee of a third-party contractor, not the shipowner, who was on board in order to repair a pump used in discharging the ship's oil cargo, was found to be within the class protected by the doctrine of seaworthiness. The injured person's status was said to be practically indistinguishable from that of a carpenter.[60]

Six years after *Hawn,* the Court decided *United New York & New Jersey Sandy Hook Pilots Association v. Halecki.*[61] Halecki was an employee of an electrical company engaged in cleaning a vessel's generators with carbon tetrachloride when he inhaled fumes and died. His administratrix sued the vessel owner, claiming that the vessel was unseaworthy. At the time of Halecki's death, the vessel was in a shipyard undergoing a complete overhaul. The Court ruled that Halecki was not a person who did the type of work traditionally done by seamen, and, consequently, the warranty of seaworthiness was not available to his administratrix. Halecki contended that, as an "electrician," the *Sieracki* rationale should apply since many modern ships carried electricians as regular crew members. Halecki also contended that he was engaged in "cleaning" part of the ship, which is traditionally seamen's work. These arguments were unsuccessful.[62]

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for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law.

Id. at 412-13.

[59] 358 U.S. 588 (1959).

[60] *Id.* at 589-90.

[61] 358 U.S. 613 (1959).

[62] *Id.* at 618. The Court stated:

Neither these decisions nor the policy that underlies them can justify extension of liability for unseaworthiness to the decedent in the present case. The work that he did was in no way 'the type of work' traditionally done by the ship's crew. It was work that could not even be performed upon a ship ready for sea, but only when the ship was 'dead' with its generators dismantled. Moreover, it was the work of a specialist, requiring special skill and spe-

The *Sieracki* decision, which conferred an unseaworthiness remedy to persons other than "true" seamen, indeed opened a "Pandora's Box" of troubles. First, it extended a no fault remedy possibly to an endless group of persons.[63] Second, and more importantly, it created one of the most fertile areas of litigation imaginable. Under *Sieracki,* injured workers entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[64] were afforded an additional right of action against a third party—the owner of the vessel on which the worker was injured. Though neither employed by nor under contract to such third-party vessel owner, the injured worker was held to be protected by the latter's warranty of seaworthiness. The result was that, for years subsequent to *Sieracki,* injured longshoremen and other workers continued to press for the expansion of the warranty of seaworthiness. This effort was successful as prior discussion indicates.

In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,[65] shipowners, sued by *Sieracki*-seamen, obtained a right of indemnity against the *Sieracki*-seamen's actual employer, namely, the stevedore.[66] As a result of *Sieracki* and *Ryan,* longshoremen-*Sieracki*-seamen sued shipowners, claiming vessel unseaworthiness. Shipowners, in turn, sought indemnity for the amount of the *Sieracki*-seaman's judgment, plus attorney's fees and other costs of defense from the *Sieracki*-seamen's employer, the stevedore. In authorizing this "merry-go-round" of litigation, *Ryan* effectively scuttled the stautory notion that a longshore-

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cial equipment—portable blowers, air hoses, gas masks, and tanks of carbon tetrachloride, all brought aboard the vessel for this special purpose, and none connected with a ship's seagoing operations.

Id. at 617.

[63] *See* 328 U.S. at 99 (a longshoreman or any other person doing the work of a seaman). Workers, other than crewmembers and longshoremen, judicially determined to be rendering "ship's services" and, as a consequence, entitled to be supplied a seaworthy vessel, include: carpenters conducting repairs to a vessel, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953), a repairman aboard to fix a pump, The Tungus v. Skovgaard, 358 U.S. 588 (1959), a watchman, Ross v. The S.S. Zeeland, 240 F.2d 820 (4th Cir. 1957), ship cleaners, Torres v. The Kastor, 227 F.2d 664 (2d Cir. 1955), and ship painters, Manhat v. United States, 220 F.2d 143 (2d Cir. 1955).

[64] 33 U.S.C. §§ 901-950 (1976 & Supp. III 1979).

[65] 350 U.S. 124 (1956).

[66] *Id.* at 126.

man's employer's liability was exclusively under the LHWCA.

Congress responded to the *Sieracki-Ryan* situation by enacting the 1972 amendments to the LHWCA,[67] notably section 905(b), which provides in pertinent part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages . . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel . . . .[68]

Thus, the only time that a longshoreman or other person covered by the Act may now maintain a suit against a vessel or its owner is when one of the latter has been negligent.[69] The vessel's owner, in turn, is prohibited from seeking *Ryan*-type indemnification from the stevedore. Therefore, no action other than the statutory one provided under the Longshoremen's Act may now be maintained by a person covered by the Act or by a vessel owner against the stevedore.

This amendment, however, probably does not affect the claims of *Sieracki*-seamen other than longshoremen.[70] They likely can still sue the vessel or its owner relying on a breach of

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[67] For an analysis of the LHWCA and the legislative history of the 1972 amendments, see Pinto v. The Santa Bella, 492 F. Supp. 689, 692-96 (D.C.Z. 1980).

[68] 33 U.S.C. § 905(b) (1976).

[69] In Scindia Steam Nav. Co. v. De Los Santos, 451 U.S. 156 (1981), the Supreme Court held that a shipowner has no duty to discover dangerous conditions that develop during cargo operations. The Court, however, went on to state that the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear. *Id.* at 158-60; *see also* Edmonds v. Compagne Generale Transatlantique, 443 U.S. 256, 261-73 (1979) (actions by stevedores against vessel).

[70] Maritime workers not covered by the LHWCA remain entitled to relief, and their employers and vessel owners remain bound by the *Sieracki-Ryan* doctrine. Aparico v. Swan Lake, 643 F.2d 1109, 1118 (5th Cir. 1981) (Federal Employees Compensation Act covers some workers).

the owner's warranty to supply a seaworthy vessel.

3. Unseaworthiness—Non-Ship's Gear—Injuries Occurring on Land Rather than on Board Vessels

The previous discussion focused on injuries occurring physically aboard the shipowner's vessel caused by defective ship's gear. Obviously, the shipowner's warranty of seaworthiness extends to those types of accidents. The warranty is not limited to injury- or death-producing accidents caused by defective ship's gear, nor is it limited to incidents occurring aboard ship.

In *Alaska Steamship Co. v. Petterson*,[71] the Supreme Court extended the shipowner's warranty to gear that did not belong to the shipowner, was not a part of the ship's equipment, and was brought aboard by the stevedore. While the injury occurred aboard the shipowner's vessel, it occurred on a part of the ship that was under control of the stevedore, not the shipowner.[72] The accident did, however, occur while the vessel was being loaded.

During the same Term, the Court reversed the Third Circuit Court of Appeals in *Rogers v. United States Lines*.[73] In *Rogers*, a longshoreman was injured by a stevedore-owned item

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[71] 347 U.S. 396 (1954) (per curiam).

[72] *Id.* at 397-99, 401 (Burton, J., dissenting). The Court in *Petterson* simply affirmed, without opinion, a decision from the Court of Appeals from the Ninth Circuit. In so doing, the Supreme Court simply cited *Sieracki* and *Hawn*. Justice Burton's dissent states that such affirmance indeed extended the warranty of seaworthiness. Justice Burton observed:

> Those cases [*Sieracki* and *Hawn*] establish that such liability for unseaworthiness exists although the injured maritime workers are not employees of the shipowner but are employees of a third party who is under contract to supply stevedoring services.
>
> The question presented by the instant case goes further. It asks whether a shipowner is liable for injuries suffered on his ship by a stevedore, even when those injuries result from unseaworthiness of equipment that does not belong to the shipowner and is not part of the ship's equipment, but belongs to the stevedore's independent employer, is part of that employer's loading equipment, and is brought on board by such employer. There is no suggestion in the cited cases that the shipowner's responsibility extends beyond the seaworthiness of his ship and its equipment, and I see no adequate reason for judicially extending it beyond that limit.

Id. at 396-97.

[73] 347 U.S. 984 (1954) (per curiam), *rev'g* 205 F.2d 57 (3d Cir. 1953).

of equipment that was used, along with the ship's gear, to unload ore from a ship. The court of appeals held that the shipowner was not liable for the injuries sustained by the longshoreman.[74] The Supreme Court, by its reversal, tacitly held that the shipowner's warranty extended to this item of equipment.

Nine years later, in *Gutierrez v. Waterman Steamship Corp.*,[75] the Supreme Court decided that not only did the shipowner warrant the fitness of non-ship's gear, but the warranty also extended to accidents occurring on piers. Gutierrez was a longshoreman-*Sieracki*-seaman. During the unloading of the shipowner's vessel, beans escaped from a defective bag and scattered on the surface of a pier against which the shipowner's vessel was moored. Gutierrez was injured when he slipped on the loose beans and fell. He sued, claiming unseaworthiness. The slip and fall occurred at a time when Gutierrez was physically located on the pier itself as opposed to any part of the vessel. The Court granted certiorari to decide two issues bearing upon the warranty of seaworthiness: "(1) whether the use of defective cargo containers constitutes unseaworthiness, and (2) whether the shipowner's warranty of seaworthiness extends to longshoremen on the pier who are unloading the ship's cargo."[76] Ruling that the defective bags rendered the vessel unseaworthy, the Court stated that "[s]eaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for loading and unloading."[77]

The Court also ruled in *Gutierrez* that the shipowner's duty to supply a seaworthy vessel extended to injuries to "seamen" engaged in unloading a ship, whether the injuries occurred aboard ship or on a pier. The shipowner's lack of "control" of the site of injury, the Court concluded, did not change this result.[78]

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[74] 205 F.2d at 57-58.

[75] 373 U.S. 206 (1963).

[76] *Id.* at 212.

[77] *Id.* at 213.

[78] *Id.* at 209. Two analogies used by the Court in its discussion of the effect of shipowner's lack of control are interesting:

> The man who drops a barrel out of his loft need not control the sidewalk to be liable to the pedestrian whom the barrel hits. See *Byrne v. Boadle*, 2 H. & C.

After *Gutierrez,* shipowners and their lawyers wondered how far ashore and to what equipment their warranty extended. In *Victory Carriers v. Law,*[79] the Court provided a partial answer to this question. Law, a longshoreman, was a driver of a forklift truck owned by his stevedore employer. Using this item of equipment, Law picked up a load and moved it on a pier to a point alongside the shipowner's vessel, where the load was to be hoisted aboard by the ship's tackle. At a time when the forklift was on the pier, its overhead protection rack fell and injured Law. Law sued, asserting that the shipowner's vessel was unseaworthy.

In deciding the case on a maritime jurisdictional basis, the Court concluded that Law did not have an unseaworthiness remedy. Specifically, the Court declined to extend the warranty of seaworthiness shoreward. "The reach of a vessel's gangplank," the Court observed, is a "rough" dividing line where the warranty of seaworthiness ends and state law begins,[80] except in cases where a ship's appurtenance causes damage ashore.[81]

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722 (Exch). And the same holds for the man who spills beans out his window, on which the pedestrian slips. Respondent allowed the cargo to be discharged in dangerous and defective bagging, from which beans were leaking before discharge of the cargo began. It had an absolute and nondelegable duty of care toward petitioner not to create this risk to him, which it failed to meet.

373 U.S. at 211-12.

[79] 404 U.S. 202 (1971).

[80] *Id.* at 207. In a footnote, the Court observed, "[r]eliance upon the gangplank line as the presumptive boundary of admiralty jurisdiction, except for cases in which a ship's appurtenance causes damage ashore, recognizes the traditional limitations of admiralty jurisdiction . . . ." *Id.* at 214 n.14.

[81] The defective forklift, which produced Law's injury, was discussed as follows:

Law was not injured by equipment that was part of the ship's usual gear or that was stored on board, the equipment that injured him was in no way attached to the ship, the forklift was not under the control of the ship or its crew, and the accident did not occur aboard ship or on the gangplank.

Id. at 213-14.

In Drachenberg v. Canal Barge Co., 571 F.2d 912 (5th Cir. 1978), Judge Brown, speaking for the Fifth Circuit, summarized, in a footnote, lower court reactions to *Victory Carriers.* Judge Brown's summary is quoted in its entirety:

> Interestingly enough, shepardizing *Victory Carriers* reveals that approximately 53 U.S. Circuit Court decisions, 43 U.S. District Court decisions, and 16 state court decisions have referred to that case.
>
> The following is a fair summary of the pertinent United States Circuit Court decisions:

4. Unseaworthiness—Character and Adequacy of Ship's Personnel

In 1955, in *Boudoin v. Lykes Brothers Steamship Co.*,[82] the Supreme Court determined that, in terms of the warranty of seaworthiness, no distinction existed between defective gear and those among the ship's personnel with a "proclivity for assaulting people."[83] By this ruling the decisions of *Mahnich* and *Sier-*

Maritime Recovery Disallowed

Whittington v. Sewer Construction Co., 4 Cir., 1976, 541 F.2d 427 (crane located on bridge to be demolished and used to lower debris to vessel below not an appurtenance of vessel in case where plaintiff's injuries sustained when he dropped from the crane to the vessel below); *Parker v. South Louisiana Contractors, Inc.*, 5 Cir., 1976, 537 F.2d 113 (ramp permanently attached to dock not an appurtenance of vessel); *Bennett v. Faircape Steamship Corp.*, 5 Cir., 1975, 524 F.2d 979, 1975 A.M.C. 1642 (stevedore's "pineapple gear" which was to be used with ship's tackle to unload cargo but had never been aboard or connected in any way with vessel not an appurtenance of ship in dock-side injury case); *Sacilotto v. National Shipping Corp.*, 4 Cir., 1975, 520 F.2d 983, 1975 A.M.C. 1357, *cert. denied*, 423 U.S. 1055, 96 S. Ct. 787, 46 L. Ed. 644 (steel billets causing shoreside injury in the process of being loaded aboard, but not yet aboard, not an appurtenance of the vessel); *Kinsella v. Zim Israel Navigation Co., Ltd.*, 1 Cir., 1976, 513 F.2d 701, 1975 A.M.C. 1208 (dunnage from vessel used on pier during unloading not an appurtenance of vessel); *Davis v. W. Bruns & Co.*, 5 Cir., 1973, 476 F.2d 246, 1973 A.M.C. 1148 (banana conveyor facility permanently affixed to shore and connected to vessel only by two steadying wires not an appurtenance of the vessel in dock-side injury case); *Snydor v. Villain & Fassio et Companie Int. Di. Genova, etc.*, 4 Cir., 1972, 459 F.2d 365 (pier-side equipment not connected with a vessel, in seven consolidated cases, held not to be appurtenances of vessel).

Maritime Recovery Allowed

Huser v. Santa Fe Pomeroy, Inc., 9 Cir., 1975, 513 F.2d 1298 (crane affixed to barge causing dock-side injury was appurtenance of vessel); *Romero Reyes v. Marine Enterprises, Inc.*, 1 Cir., 1974, 494 F.2d 866, 1974 A.M.C. 2236 (gangway permanently affixed to pierbased tower was appurtenance of vessel); *Garrett v. Gutzeit O/Y*, 4 Cir., 1974, 491 F.2d 228, 1974 A.M.C. 319 (bales of pulp paper on pier, recently unloaded from vessel and to be moved via hand trucks to sled on pier, constituted appurtenances of vessel); *Kloster v. S.S. Chatham*, 4 Cir., 1973, 475 F.2d 43, 1973 A.M.C. 1271 (maritime cause of action cognizable where slack mooring lines and consequential excessive motion of vessel in water caused ship's hoist to dislodge pipe injuring plaintiff on pier).

Id. at 922 n.19.

[82] 348 U.S. 336 (1955).

[83] *Id.* at 339. In so holding, the Court stated:

> We see no reason to draw a line between the ship and the gear on one hand and the ship's personnel on the other. A seaman with a proclivity for assaulting people may, indeed, be a more deadly risk than a rope with a weak

acki, in effect, were deemed applicable to the fitness of a ship's *people* and not limited to fitness of ship's gear. Boudoin, a true seaman, was viciously attacked by a deckhand named Gonzales, "a person of violent character, belligerent disposition, excessive drinking habits, disposed to fighting and making threats and assaults."[84] There was no proof that the shipowner or any of its agents knew of Gonzales' violent propensities; this meant, arguably, that these propensities were "latent." The presence of Gonzales on board the ship, however, because of his "defective" disposition, rendered the shipowner's vessel unseaworthy.[85] While an assault might well be within the "usual and customary standards of the calling," the Court observed that a truly vicious seaman can be more dangerous than a defective piece of equipment.[86]

The Supreme Court in *Boudoin* suggested that there exists a relationship between customary industry standards and seaworthiness.[87] *Boudoin* involved a defect in the *quality* of a particular crew member that caused injury to another co-employee. *Waldron v. Moore-McCormack Lines, Inc.*[88] represents a logical

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> strand, or a hull with a latent defect. The problem, as with many aspects of the law, is one of degree. Was the assault within the usual and customary standards of the calling? Or is it a case of seaman with a wicked disposition, a propensity to evil conduct, a savage and vicious nature? If it is the former, it is one of the risks of the sea that every crew takes. If the seaman has a savage and vicious nature, then the ship becomes a perilous place. A vessel bursting at the seams might be a safer place than one with a homicidal maniac as a crew member.

Id. at 339-40.

[84] *Id.* at 338.

[85] *Id.* at 340.

[86] *Id.*

[87] *Id.* Many lower courts have adopted into the law of unseaworthiness the rule of The T.J. Hooper, 60 F.2d 737, 738-39 (2d Cir. 1932), *cert. denied*, 287 U.S. 662 (1932), a negligence case, holding that the standard of reasonableness is not necessarily controlled by the customary standard of the calling, since that standard may not be a reasonably safe one. *See, e.g.*, Marshall v. Ove Skou Rederi A/S, 378 F.2d 193, 200-01 (5th Cir. 1967) (general practice of shipping industry is not the measure of duty owed), *cert. denied*, 389 U.S. 828 (1967); Bryant v. Partenreederei-Russ, 330 F.2d 185, 189 (4th Cir. 1964) (same); June T., Inc. v. King, 290 F.2d 404, 406 (5th Cir. 1961) (same); Davis v. Associated Pipe Line Contr., Inc., 305 F. Supp. 1345, 1349 (W.D. La. 1968) (same), *aff'd*, 418 F.2d 920 (5th Cir. 1969), *cert. denied*, 397 U.S. 988 (1970); Hanson v. Reiss S.S. Co., 184 F. Supp. 545, 549 (D. Del. 1960) (same).

[88] 386 U.S. 724 (1967).

expansion of the *Boudoin* ruling to include instances where the vessel's crew is fit in terms of the character or quality of its members, but is unfit, that is, defective, in terms of the quantity to do the job at hand. In *Waldron,* the Court ruled that the assignment of too few men to perform a particular task rendered the involved vessel unseaworthy.[89]

Seamen-plaintiffs whose own acts alone have created conditions of unseaworthiness that have caused their own injuries have attempted to extend the *Boudoin* rule to recover on the basis of their own unfitness as a seaman. Such attempts have usually failed.[90]

5. "Operational Negligence" as Unseaworthiness

From prior discussion, one might reasonably conclude that the negligence of a crew member that causes injury to a fellow employee, or, for that matter, a longshoreman, can support an unseaworthiness action independent from the Jones Act. *Waldron* is credited with establishing the concept that "operational negligence" of a co-employer can render a vessel unseaworthy. Waldron, a seaman, was ordered to uncoil a heavy rope during a vessel's locking operation and was injured in attempting to perform his assigned job.[91] To support his Jones Act negligence claim, Waldron sought to prove that the mate's order was negligent because three or four men, rather than the two assigned,

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[89] *Id.* at 728. The Court reasoned:

> If the petitioner has been ordered to use a defective pulley in lifting the rope, he would clearly be protected by the doctrine of unseaworthiness. If the pulley itself were sound but petitioner had been ordered to load too much rope on it, he could likewise be protected. If four men had been assigned to uncoil the rope but two of the men lacked the strength of ordinary efficient seamen, petitioner would again be protected. Should this protection be denied merely because the shipowner, instead of supplying petitioner with unsafe gear, insufficient gear, or incompetent manual assistance, assigned him insufficient manual assistance? We think not.

Id.

[90] *See, e.g.,* Holmes v. Mississippi Shipping Co., 301 F.2d 474, 480 (5th Cir. 1962) (no recovery where plaintiff seaman intentionally cut off his own hand during crazed fit), *cert. dismissed,* 371 U.S. 802 (1962); Hill v. Flota Mercante Grancolombiana, S.A., 267 F. Supp. 380, 384 (E.D. La. 1967) (no recovery where plaintiff injured because he was too fat to get through larger than standard hatch without difficulty).

[91] 386 U.S. at 728.

were required to perform the task. The Court held that the negligent assignment of too few men to the job at hand rendered the vessel unseaworthy.[92]

Waldron, and a confusing reversal by the Supreme Court two weeks later,[93] caused much confusion in the lower courts as to whether, and under what circumstances, operational negligence constituted unseaworthiness. *Usner v. Luckenbach Overseas Corp.*[94] partially answered the questions posed by *Waldron.* The Court in *Usner* said:

> [T]he court has repeatedly taken pains to point out that liability based upon seaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition,* and how that *condition* came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.[95]

The quoted language raises several questions. In the Court's opinion the word "condition" is emphasized. Did the Court, in emphasizing its use of that word, mean to indicate something static? Or, alternatively, must the activity that caused the "condition" have come to rest? Could continuous activity result in a "condition" thereby causing unseaworthiness?

These questions prompt consideration of the facts in *Usner* and other language in the Court's opinion. A longshoreman was injured when a co-employee lowered a sling from a boom in such a manner as to strike him and to knock him to the deck. Since

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[92] *Id.* at 727-28.

[93] Two weeks after the Court decided *Waldron,* it granted certiorari and reversed, without opinion, a lower court's determination that no unseaworthiness existed. Mascuilli v. United States, 387 U.S. 237 (1967) (per curiam) (citing Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423 (1959); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944)). In *Mascuilli* a longshoreman was killed on the vessel during a loading operation. The death was due to the carelessness of the deceased's fellow longshoremen. The district judge found that the ship and its appurtenances were all seaworthy and fit for service and that the sole cause of the accident was the negligence of the longshoremen. Mascuilli v. United States, 358 F.2d 133, 135 (3d Cir. 1966), *rev'd,* 387 U.S. 237 (1967). The lower courts found that operational negligence existed but this did not render the vessel unseaworthy. The Supreme Court reversed, but did not comment on the issue of whether operational negligence did or did not equal unseaworthiness.

[94] 400 U.S. 494 (1971).

[95] *Id.* at 498.

there was nothing wrong with the winch, this accident was due simply to the co-employee's negligent operation of otherwise seaworthy equipment, a situation similar or, arguably, identical to *Crumady*.[96] Unlike *Crumady,* however, the vessel on which Usner was working was determined to be seaworthy. The *Usner* Court reasoned:

> What caused the petitioner's injuries . . . was not the condition of the ship, her appurtenances, her cargo or her crew, but the *isolated* personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions.[97]

Usner teaches, therefore, that when a ship's employee is guilty of an "isolated" negligent act that injures a co-employee, no "condition" of unseaworthiness exists. The *Usner* Court made no attempt to define what constitutes an "isolated" negligent act. Moreover, the *Usner* Court did not decide when, and under what circumstances, negligent action can create an unseaworthy condition.[98]

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[96] Dissenting Justices Douglas, Black, Brennan, and Harlan concluded that *Mahnich, Crumady,* and *Mascuilli* had clearly established that "operational negligence" constituted unseaworthiness. *Id.* at 501-04.

[97] *Id.* at 500 (emphasis added).

[98] *Id.* The Fifth Circuit has read *Usner* to mean that the negligence of a longshoreman or his fellow longshoremen in loading or unloading cargo *can* create a "condition" that might render a vessel unseaworthy. The court stated:

> Usner distinguished "instantaneous" unseaworthiness from what might be called "connected" unseaworthiness. A longshoreman or one of his fellows might engage in a congeries of negligent acts that are of such a character or that continue for such a length of time that they become related to the status of the vessel. That *congeries* of acts might create a "condition" of unseaworthiness, so that an individual act of negligence within or after the *congeries* might give rise to liability under the unseaworthiness doctrine. However, if the negligent act of a longshoreman is not part of any *congeries* of negligent acts connected to the status of the vessel or to its loading but is rather an isolated "instantaneous" act of negligence within an otherwise seaworthy method of loading on an otherwise seaworthy vessel, then that one act of negligence by the longshoreman or his fellows will not render the vessel unseaworthy. Although the distinction might seem simple to apply on paper, it is quite a difficult line to draw in practice.

It is submitted that, at present, more questions than answers exist relating to the operational negligence-as-unseaworthiness issue. Obviously, this is a fertile area for further judicial enlightenment. If the past bodes any course for the future, the term "isolated personal negligent acts" of co-employees will be defined in a manner so as to permit a finding of unseaworthiness under most factual circumstances. As has previously been discussed, unseaworthiness concepts tend to develop in ways that allow seamen to win and shipowners to lose close, questionable lawsuits. There is little reason to predict that the oncoming evolution of the operational negligence doctrine will be of any solace to shipowners or, for that matter, their lawyers.

II. THE JONES ACT

In 1920, Congress passed the Jones Act,[99] which granted to seamen essentially the same rights against their employers that are given to railroad employees by the Federal Employer's Liability Act.[100] A discussion of this statutory remedy follows.

A. Seamen under the Jones Act

The Jones Act affords a remedy that is predicated on negligence and that is available only to "seamen" injured or killed in the course of employment.[101] The Act gives a seaman a right of action only against his "employer," who may or may not be the involved vessel's owner.[102] In promulgating the Jones Act, Con-

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Robinson v. Showa Kaiun K.K., 451 F.2d 688, 690 (5th Cir. 1971) (citations omitted).

[99] Jones Act, ch. 250, § 33, 41 Stat. 1007 (1920) (codified as amended at 46 U.S.C. § 688 (1976)).

[100] 45 U.S.C. §§ 51-60 (1976).

[101] *See* Wixom v. Boland Mar. & Mfg. Co., 614 F.2d 956, 957 (5th Cir. 1980) (only seamen can recover under Jones Act and vessel must be in navigation at time of injury in order to claim seamen status); Guidry v. South La. Contr., 614 F.2d 447, 452 (5th Cir. 1980) (only seamen entitled to benefits of Jones Act); Garcia v. Quin, Ltd., 487 F.2d 625, 627-28 (5th Cir. 1973) (to have seamen status for Jones Act, must show vessel in navigation, that plaintiff was aboard to aid in navigation, and that connection with vessel was of permanent nature).

[102] An employer-employee relationship must exist for a Jones Act suit to be maintainable, but the seaman's employer does not necessarily have to be the owner or operator of the vessel on which the seaman is injured. *See* Spinks v. Chevron Oil Co., 507 F.2d 216, 224 (5th Cir. 1975) (contractor liable). *Spinks* also supports the proposition that a

gress did not define the term "seamen," nor did it specify what type of worker it intended to receive the benefit of the Jones Act negligence remedy. The courts have had little difficulty in supplying this legislative omission. A leading case in this regard is *Offshore Co. v. Robison,*[103] an often-quoted decision that undertook to reconcile both Supreme Court and lower court authority relating to Jones Act seamen status issues.

The Court in *Robison* determined that persons who meet the following tests are Jones Act seamen:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its movement or during anchorage for its future trips.[104]

The first factor that *Robison* imposed for determining Jones Act seaman status deals with the worker's connection with the involved vessel, which must, to some degree, be permanent. Persons who are aboard a shipowner's vessel merely because of a fortuitous set of circumstances are not Jones Act seamen,[105] al-

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seaman can become the "borrowed servant" of a party other than a vessel owner or operator and, as such, such third party vessel owner becomes the seaman's Jones Act employer. *Id.; see also* Guidry v. South La. Contr., 614 F.2d 447, 453 (5th Cir. 1980) (third party contractor). For example, in Barrios v. Louisiana Constr. Materials Co., 465 F.2d 1157 (5th Cir. 1972), an individual who was employed by a third party contractor, who did not have operational control over the involved vessel but supervised the ongoing vessel operations, was allowed to sue the contractor under the Jones Act. *Id.* at 1163. A vessels charterer can likewise be sued as a Jones Act employer. *See* Viger v. Geophysical Servs., Inc., 338 F. Supp. 808, 811 (W.D. La. 1972) (charterer liable), *aff'd,* 476 F.2d 1288 (5th Cir. 1973).

[103] 266 F.2d 769 (5th Cir. 1959).

[104] *Id.* at 779.

[105] In Kirk v. Land & Marine Applicators., Inc., 555 F.2d 481 (5th Cir. 1977), a sandblaster and painter was found to work principally on a fixed platform. Though he occasionally unloaded equipment from the vessel and cleaned sandblasting equipment situated aboard the vessel, these activities were said to be incidental to his fixed plat-

though a person will not be deprived of Jones Act status simply because he had served aboard the craft for only a relatively short period of time,[106] or was temporarily assigned to duties that were typically seamen's tasks.[107] In fact, once it is determined that a worker is a seaman, he can recover from his Jones Act employer for injuries that occur ashore and that are not related to the service of the ship.[108]

The next factor relates to the status of the craft on which the person sustained injury. In seeking to determine whether a particular craft, device, or structure is a "vessel," some courts consider the purpose for which the craft was constructed and the business in which it is engaged.[109] Traditionally, structures that transport passengers, cargo, or equipment on navigable waters are deemed to be vessels and satisfy the *Robison* test.[110] Capacity to float or to sustain movement does not, by itself, establish that the craft is a vessel for purposes of the Jones Act.[111]

Special purpose crafts such as mobile drilling platforms and submersible drilling barges that expose persons working aboard them to the same hazards of the sea as traditional vessels are deemed to be vessels, and persons injured on them are usually covered by the Jones Act.[112] Rafts,[113] barges used as plat-

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form duties. He was not a Jones Act seaman. *Id.* at 483; *see also* Davis v. Hill Eng., Inc., 549 F.2d 314, 331 (5th Cir. 1977) (seamen must have more than transitory connection with vessel).

[106] *See* Porche v. Gulf Miss. Marine Corp., 390 F. Supp. 624, 626 (E.D. La. 1975) (Jones Act does not deny seamen status to those whose duties are truly navigational merely because they are aboard vessel for short time).

[107] *See* Doucet v. Wheless Drilling Co., 467 F.2d 336, 339-40 (5th Cir. 1972) (status not lost because temporarily assigned to do repair work on vessel).

[108] Blanchard v. Engine & Gas Compressor Servs., 575 F.2d 1140, 1143 (5th Cir. 1978).

[109] *See id.* (submersible barge that was not moved on regular basis, that did not carry navigational equipment, and that was not registered was not vessel for Jones Act purposes).

[110] *See* Griffith v. Wheeling Pitt. Steel, 521 F.2d 31, 36-37 (3d Cir. 1975) (movable barge is vessel); Bennett v. Perini Corp., 510 F.2d 114, 116 (lst Cir. 1975) (where worker engaged in building bridge from barge moored to pier, held a vessel).

[111] *See* Cook v. Belden Concrete Prods., 472 F.2d 999, 1001 (5th Cir. 1973) (floating construction platform secured to dock as stationary structure not a vessel).

[112] *See* Wilkerson v. Teledyne Movible Offshore, Inc., 496 F. Supp. 1279, 1283 (E.D. Tex. 1980) (movable drilling platforms are vessels, while permanently affixed drilling platforms are not); Johnson v. Noble Drilling Co., 264 F. Supp. 104, 106 (W.D. La. 1966)

forms,[114] and drydocks[115] are not vessels within the purview of the Jones Act. Hazards on these types of devices more closely resemble land-based risks, and for this policy reason, Jones Act protection does not extend to injuries or deaths occurring on or about them.

Another factor germane to a Jones Act seamen status inquiry relates to whether the involved vessel was "in navigation" at the time of the seaman's injury. Structures or crafts that have been mothballed[116] or withdrawn from service for extensive reconstruction[117] are usually not deemed to be "in navigation" so as to afford persons injured or killed on them a Jones Act remedy.

Several factors are important in deciding whether a vessel is or is not "in navigation." The presence of a crew suggests "in navigation" status while its absence is evidence that a vessel is not "in navigation."[118] Likewise, capacity to move is an element courts consider, and generally, vessels fixed in place are deemed not to be "in navigation."[119]

Vessels temporarily tied up, however, are usually deemed to be "in navigation,"[120] and this includes vessels in shipyards undergoing general repairs for the purpose of returning the vessel to active service.[121] Vessels engaged only in seasonal work are not "in navigation" during seasonal lay up[122] nor are vessels that

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(oil drilling platform permanently affixed to ocean floor not a vessel).

[113] *See* Powers v. Bethlehem Steel Corp., 477 F.2d 643, 645 (1st Cir. 1973) (raft upon which employee engaged in repair of pier not a vessel).

[114] *See* Leonard v. Exxon Corp., 581 F.2d 522, 524 (5th Cir. 1978) (insufficient to constitute vessel that platform afloat when worker injured); Cook v. Belden Concrete Prods., 472 F.2d 999, 1001 (5th Cir. 1973) (stationary construction platform not a vessel).

[115] *See* Atkins v. Greenville Shipbuilding Corp., 411 F.2d 279, 281 (5th Cir. 1969) (floating dry dock not a vessel under the capacity test).

[116] Roper v. United States, 368 U.S. 20, 21 (1961).

[117] Desper v. Starved Rock Ferry Co., 342 U.S. 187, 188 (1952).

[118] *See id.* at 191 (vessel had no crew); Bodden v. Coordinated Caribbean Transp., 369 F.2d 273, 275 (5th Cir. 1966) (presence or absence of crew a factor); Kibadeaux v. Standard Dredging Co., 81 F.2d 670, 673-74 (5th Cir. 1936) (finding plaintiff a seaman).

[119] *See* Freeman v. Aetna Casualty & Sur. Co., 398 F.2d 808, 809 (5th Cir. 1968) (stationary drilling platform not "in navigation").

[120] *See* Daffin v. Pape, 170 F.2d 622, 624 (5th Cir. 1948) (vessel temporarily in port held "in navigation").

[121] Bodden v. Coordinated Caribbean Transp., 369 F.2d 273, 275 (5th Cir. 1966).

[122] *See* Desper v. Starved Rock Ferry Co., 342 U.S. 187, 191 (5th Cir. 1952) (vessel

have, in fact, been intentionally withdrawn from navigation.[123] Special purpose water craft that are normally fixed in place during operation are deemed to be "in navigation" for injury or death occurring at the time they are in place.[124] The determination of whether a vessel is "in navigation" for purposes of Jones Act coverage is usually a question of fact,[125] although the issue has occasionally been decided as a matter of law.[126]

The final factor to be considered in deciding Jones Act seamen status relates to the type of task being performed by the person in question. Under *Robison,* the person seeking the benefits of the Jones Act remedy must further the mission of the vessel. Obviously, persons who actually contribute to the navigation of the vessels (pilots, engineers, mates, deckhands, and other true crew members) are Jones Act seamen. Persons who contribute to the benefit of the vessels, in the broadest sense, have been deemed to be Jones Act seamen. Welders,[127] oilers,[128] mess men,[129] and even hair dressers,[130] musicians,[131] and bartenders[132] have satisfied this aspect of the *Robison* test.[133]

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laid up for winter not "in navigation").

[123] *See* Seneca Washed Gravel Corp. v. McManigal, 65 F.2d 779, 780 (2d Cir. 1933) (withdrawn from navigation).

[124] *See* Sendo v. LaCrosse Dredging Corp., 352 U.S. 370, 372-73 (1957) (fact that dredge not frequently in transit and connected to shore held not controlling since person may be a crew member while vessel is at anchor).

[125] *See* Stanley v. Guy Scroggins Constr. Co., 297 F.2d 374, 376 (5th Cir. 1961) (whether person is seaman is question of fact); McKie v. Diamond Marine Co., 204 F.2d 132, 136 (5th Cir. 1953) (same).

[126] *See* Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190-91 (1952) (Court concluded decedent not a seaman).

[127] Davis v. Hill Eng., Inc., 549 F.2d 314, 328 (5th Cir. 1977).

[128] Spinks v. Chevron Oil Co., 507 F.2d 216, 218 (5th Cir. 1975).

[129] Warren v. United States, 340 U.S. 523, 524 (1951).

[130] Mahramas v. American Isbrandtsen Lines, 475 F.2d 165, 167, 170 (2d Cir. 1973).

[131] The Sea Lark, 14 F.2d 201, 202 (W.D. Wash. 1926).

[132] The J.S. Warden, 175 F. 314, 314 (C.C.S.D.N.Y. 1910).

[133] Other cases have discussed this facet of the *Robison* test, which is easily satisfied. *See, e.g.,* Bazile v. Bisso Marine Co., 606 F.2d 101, 104 (5th Cir. 1979), *cert. denied,* 449 U.S. 829 (1980) (*Robison* does not restrict a seaman to one vessel; plaintiff assigned to several vessels); Brown v. ITT Rayonier, Inc., 497 F.2d 234, 237 n.4 (5th Cir. 1974) (aiding the vessel in navigation); Magnolia Towing Co. v. Pace, 378 F.2d 12, 13 (5th Cir. 1967) (pilot met *Robison* test).

B. *Jones Act Negligence*

The essence of a Jones Act suit is negligence; that term is employed in a Jones Act context in a manner similar to that utilized at common law.[134] A seaman bringing a Jones Act negligence suit, like his common law counterpart, bears the burden of proving the essential elements of a negligence action: the existence of a duty, the negligent breach of that duty by the defendant, and some causal relationship between the breach and injury.

The term "negligence," as used in the Federal Employer's Liability Act, and incorporated into the Jones Act by reference,[135] is given a broad and liberal construction. The Supreme Court in *Jamison v. Encarnacion,*[136] stated: "The Jones Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted."[137] The Jones Act is remedial in nature and exists for the benefit and protection of seamen. One circuit court of appeals observed that "while the gravaman of a Jones Act suit is negligence, it is not the relatively narrow common law concept of negligence, but a more liberal one commensurate with the broad purposes of the . . . Act."[138]

A seaman's contributory negligence does not operate to bar the maintenance of a Jones Act suit. Rather, the doctrine of comparative fault is applicable.[139] As a matter of law, however, a seaman cannot be contributorily negligent for carrying out orders that result in his own injury even though the seaman recognizes the possible danger of doing so.[140]

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[134] Forgione v. United States, 202 F.2d 249, 252 (3d Cir.), *cert. denied,* 345 U.S. 966 (1953).

[135] *See* 46 U.S.C. § 51 (1976) (scope of liability under FELA).

[136] 281 U.S. 635 (1930).

[137] *Id.* at 640.

[138] Forgione v. United States, 202 F.2d 249, 252 (3d Cir.) (citations omitted), *cert. denied,* 345 U.S. 966 (1953).

[139] Johannessen v. Gulf Trading & Transp. Co., 633 F.2d 653, 655 (2d Cir. 1980).

[140] Because the shipowner has an absolute duty to provide a seaworthy vessel, the doctrine of contributory negligence cannot operate to bar plaintiff's recovery. Clements v. Chotin Transp., Inc., 496 F. Supp. 163, 167 (M.D. La. 1980). The plaintiff's contributory negligence can, however, reduce the amount of damages. *Id.* Thus, the doctrine of

C. *Election of Remedies*

The Jones Act provides that an injured seaman "may, *at his election,* maintain an action for damages at law."[141] Early cases interpreted this language to mean that the seaman had to "elect" between suing for negligence under the Jones Act or for unseaworthiness under general maritime law. It is now settled that no such election is required.[142] The right to recover maintenance and cure, to recover damages under the doctrine of unseaworthiness, and to recover for Jones Act negligence are consistent and cumulative remedies.[143]

The fact that a seaman is not required to elect between a negligence remedy and unseaworthiness remedy does not mean that he can sue on one ground and, subsequently, sue on the other. A seaman's suit must include all grounds of recovery for which he expects judgment to be entered in his favor.[144] The practitioner would, therefore, be well advised to incorporate all available remedies — maintenance and cure, negligence, and unseaworthiness in his complaint or declaration.[145]

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comparative negligence is applied and plaintiff's damages are appropriately mitigated. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 426-32 (1939); Hlodan v. Ohio Barge Lines, Inc., 611 F.2d 71, 74 (5th Cir. 1980).

In order for contributory negligence to exist at all, the seaman in question must have had a duty to act or to refrain from acting. Bobb v. Modern Prods., Inc., 648 F.2d 1051, 1057 (5th Cir. 1981). In Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975), the Fifth Circuit found that the duty of a seaman is to do the work assigned, not to find the safest method for doing the work. While the employer's duty to provide a safe place for the seaman to work is a broad one, "the seaman's duty to protect himself . . . is slight." *Id.* at 223. Even though his duty is slight, the seaman does have a duty to use reasonable care. *See* Hussein v. Isthmian Lines, Inc., 405 F.2d 946, 949 (5th Cir. 1968) (seaman must exercise reasonable care in choosing proper equipment).

[141] 46 U.S.C. § 688 (1976) (emphasis added).

[142] In Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928), the Court stated:

> And we conclude that the alternative measures of relief accorded him, between which he is given an electon, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness . . . .

Id. at 139.

[143] *Id.* at 136-38.

[144] *E.g.,* Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 320 (1927) (plaintiff may not split up his demand and prosecute it piecemeal).

[145] While the seaman has the right to join his claim for maintenance and other general maritime claims with his Jones Act claim, Romero v. International Terminal Operat-

D. Proximate Cause

Most seamen's personal injury and death actions seek recovery for both Jones Act negligence and unseaworthiness. Since it is easier to prove that a vessel is unseaworthy, because no fault need be established, most cases tend to focus on the shipowner's warranty of seaworthiness rather than its negligence under the Jones Act.[146] There are situations where a seaman's Jones Act claim has a better prospect for success than does his unseaworthiness claim. The most common example of this involves instances where the issue of proximate cause poses a significant recovery problem. To recover for unseaworthiness, a seaman injured or killed on a shipowner's vessel must not only prove the existence of an unseaworthy condition, but must also prove that the unseaworthiness proximately caused or contributed to the injury or death.[147]

The FELA-based case of *Rogers v. Missouri Pacific Railroad*[148] established a different and more relaxed standard for measuring proximate cause under the Jones Act. In reference to the FELA, the *Rogers* Court stated: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusions that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."[149] The language in *Rogers* has been adopted to de-

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ing Co., 358 U.S. 354, 375, 379 (1959), and to obtain a jury trial on all of these claims, Fitzgerald v. United States Lines, 374 U.S. 16, 20 (1963), he is not obligated to do so, Pelotto v. L & N Towing Co., 604 F.2d 396, 400-01 (5th Cir. 1979). The seaman may either sue separately for maintenance and cure or ask for severance of the maintenance claim. Caulfield v. AC & D Marine, Inc., 633 F.2d 1129, 1133 (5th Cir. 1981).

[146] The causation required to sustain an unseaworthiness claim is less than that required for a common law negligence action. Landry v. Two R. Drilling Co., 511 F.2d 138, 142 (5th Cir. 1975); Peymann v. Perini Corp. 507 F.2d 1318, 1324 (1st Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). It is sufficient that there is some evidence that the unseaworthy condition was a direct and substantial cause of the seaman's injury. Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 201 (1st Cir. 1980).

[147] *See, e.g.*, Fox v. The S.S. Moremacwind, 285 F.2d 222, 224 (4th Cir. 1960) (unseaworthy condition must be cause of injury); Samanski v. Mobile Seaford Co., 258 F.2d 823, 825 (5th Cir. 1958) (plaintiff must at least prove injury was probably caused by occurrence on board the vessel).

[148] 352 U.S. 500 (1957).

[149] *Id.* at 506.

fine proximate cause in a Jones Act case.[150] A shipowner, therefore, will be deemed liable under the Jones Act if he is found to be negligent and if his negligence played even the slightest part in causing the injury or death for which damages are sought.[151]

In instructing a jury on the issue of unseaworthiness, it would be correct for the trial court to utilize traditional proximate cause terminology; in other words, that the act or omission complained of must be a cause, which in the natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of, and without which it would not have occurred.[152] Such an instruction would be erroneous regarding the Jones Act aspect of the case. As stated, the shipowner is liable under the Jones Act if his negligence played even a slight role in producing the seaman's injury.[153]

Cases in which seamen drown under circumstances where the actual "cause" for such a tragic event cannot be explained provide a good example of how the relaxed standard of proving proximate cause can be of substantial tactical benefit to the Jones Act plaintiff. In *Schulz v. Pennsylvania Railroad*,[154] a seaman was assigned to inspect four tugboats at night and he was last seen returning to one of the boats to change clothes. Subsequent investigation disclosed that he drowned. The shipowner was "short handed" on the night of Schulz's death, the illumination in the area where he was required to work was poor, and ice had formed on the tugs he was directed to inspect. The plaintiff, however, had no proof that these factors "caused" Schulz's fall overboard and ensuing death.[155]

The Court ruled that evidence of undermanning, inadequate lighting, and the presence of ice sufficiently permited the jury to infer that such factors were partially responsible for the sea-

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[150] *See,* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957) (standard of liability under Jones Act is that established by Congress under FELA).

[151] 352 U.S. at 506.

[152] *E.g.,* Page v. Southwestern Ry., 312 F.2d 84, 87 (5th Cir. 1963) (traditional definition of probable cause).

[153] *E.g.,* Peymann v. Perini Corp., 507 F.2d 1318, 1324 (1st Cir. 1974) (causation established if defendant's negligence contributed even in slightest part).

[154] 350 U.S. 523 (1956).

[155] *Id.* at 523-25.

man's death. The Court's language is interesting:

> In this case petitioner is entitled to recover if her husband's death resulted *'in whole or in part' from defendant's negligence.* Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable.' Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn.[156]

It is apparent that the very relaxed proximate cause standard existing under the Jones Act assisted in obtaining submission of this case to the jury.

E. Forum Shopping — Trial by Jury

Suits by seamen based on the Jones Act are maintainable in either state court or federal district court, regardless of the amount at issue[157] or the citizenship of the parties.[158] In such

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[156] *Id.* at 526 (emphasis added).

[157] *See* Ballard v. Moore-McCormack Lines, Inc., 285 F. Supp. 290, 295 (S.D.N.Y. 1968) (Jones Act regulates commerce under 28 U.S.C. § 1337 (1976), thus no jurisdictional amount necessary); Richardson v. St. Charles-St. John the Baptist Bridge & Ferry Auth., 274 F. Supp. 764, 768-69 (E.D. La. 1967) (no jurisdictional amount required whether brought in law or admiralty). *But see* Wade v. Rogala, 270 F.2d 280, 283 (3d Cir. 1959) (jurisdictional amount is required); Turner v. Wilson Line, 242 F.2d 414, 416-17

suits, the seaman-plaintiff has the right to trial by jury.[159] Once filed in state court, a Jones Act-based action is not removable to federal court by the shipowner.[160]

Actions seeking recovery for maintenance and cure alone, or actions seeking damages arising solely because of the unseaworthiness of a vessel, are maritime in nature, are within the purview of the court's admiralty jurisdiction, and are traditionally decided by the court without a jury. Maintenance and cure suits and unseaworthiness claims, though admiralty in nature, may be brought in a state court by virtue of the "saving to suitors" clause.[161] If diversity of citizenship and the required jurisdictional amount exist, these admiralty actions can also be maintained on the law side of a federal court.[162]

(1st Cir. 1957) (on law side, plaintiff must meet jurisdictional amount).

[156] *See* Van Camp Seafood Co. v. Nordyke, 140 F.2d 902, 904-05 (9th Cir. 1944) (Jones Act confers authority to hear an action at law by an injured seaman regardless of parties' citizenship).

The Jones Act was patterned after the Federal Employer's Liability Act, 45 U.S.C. § 51 (1976), and makes available to seamen the benefits previously applicable to railroad workers. *See* Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 546-47 (1960) (Jones Act extended to seamen remedies available to railroad workers under FELA); Bell v. Tug Shrike, 332 F.2d 330, 334-35 (4th Cir.) (FELA case held controlling in Jones Act case), *cert. denied*, 379 U.S. 844 (1964). It has been held that FELA actions arise under 28 U.S.C. § 1337, governing acts regulating commerce, therefore, there is no requirement of jurisdictional amount. *See* Imm v. Union R.R., 289 F.2d 858, 861 (3d Cir. 1961) (no jurisdictional amount necessary for FELA case arising under section 1337), *cert. denied*, 368 U.S. 833 (1961). *See generally* G. GILMORE & C. BLACK, *supra* note 8, at 468-71.

[159] *See* Panama R.R. v. Johnson, 264 U.S. 375, 390-91 (1924) (Jones Act giving injured seaman right to jury trial held constitutional).

[160] *See* Pate v. Standard Dredging Corp., 193 F.2d 498, 500 (5th Cir. 1952) (FELA and, therefore, the Jones Act by incorporation, prohibits removal to federal court).

[161] 28 U.S.C. § 1333 (1976) provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

See Garrett v. Moore-McCormack Co., 317 U.S. 239, 243 (1942) (savings clause authorizes state courts to try cases coming within the defined category).

[162] *See* Jesonis v. Olson & Co., 238 F.2d 307, 308 (9th Cir. 1956) (no jurisdiction without diversity in unseaworthiness case unless court is sitting in admiralty); Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F.2d 253, 257 (2d Cir. 1956) (if diversity is present and amount in controversy exceeds jurisdictional amount, court has common law jurisdiction of unseaworthiness claim); Doucette v. Vincent, 194 F.2d 834, 839-40 (1st Cir. 1952) (court had jurisdiction on law side in claim of unseaworthiness and for maintenance and cure, although diversity was absent, where amount in controversy exceeded jurisdictional amount).

The combining of a Jones Act suit with actions for unseaworthiness and maintenance and cure will enable the seaman-plaintiff to obtain a jury for resolution of all aspects of his case. A seaman-plaintiff may sue separately for maintenance and cure or ask for a severence of the maintenance and cure claim and an expedited trial of it by the court. *Fitzgerald v. United States Lines Co.*[163] is instructive on this point. In *Fitzgerald,* Martin, a seaman, brought an action at law in the federal district court against his employer-shipowner claiming negligence under the Jones Act, unseaworthiness of the vessel, and seeking maintenance and cure. He demanded a jury trial.[164]

Before a jury was selected, the trial judge decided that Martin's maintenance and cure claim would be decided by the court. Thereafter, the jury found the shipowner free from negligence and the ship seaworthy, and the trial judge awarded Martin a sum for maintenance and cure.[165] Martin appealed, complaining that the trial judge should have also allowed the jury to decide the issue of maintenance and cure. The Court held that it was error for the trial judge to deny the seaman a jury trial on his maintenance and cure claim since that claim arose out of the same fact situation forming the basis of the seaman's Jones Act and unseaworthiness cause of action.[166] The Court said:

> Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery. Requiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly complicates and confuses a trial, creates difficulties in applying doctrines of res judicata and collateral estoppel and can easily result in too much or too little recovery.[167]

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[163] 374 U.S. 16 (1963).
[164] *Id.* at 16-17.
[165] *Id.* at 17.
[166] *Id.* at 21.
[167] *Id.* at 18-19.

III. Maintenance and Cure

A. General Observations About the Remedy

A seaman rendered ill or injured while engaged in the service of the ship is entitled to be paid maintenance and cure at the expense of the shipowner-employer. This remedy originated in medieval sea codes[168] and is now afforded to seamen by most seafaring nations. According to early decisions, seamen, as a class, tend to be grossly irresponsible[169] and need protection from the economic impact of maritime employment-related illness and injury. As a result of this perceived need, the maintenance and cure remedy is afforded to American seamen.

At common law in many jurisdictions, a plaintiff's contributory negligence completely bars recovery.[170] Under the Jones Act and actions based on the unseaworthiness of a shipowner's vessel, the rule of comparative negligence is applicable.[171] The amount of a seaman's recoverable maintenance and cure, however, is not subject to reduction by "ordinary," as distinguished from "gross," negligence or fault on the part of the involved seaman.[172] Seamen deemed to be guilty of gross misconduct that causes an injury for which maintenance and cure is sought are

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[168] For a compilation of several maritime codes, see 30 F. Cas. 1171-1216 app. (1897).

[169] An early, often-cited case states:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt.

Harden v. Gordon, 11 F. Cas. 480, 483 (C.C. Me. 1823) (No. 6047).

[170] *See* 65A C.J.S. *Negligence* § 130 (1966) (contributory negligence a complete defense, relieving defendant of all liability).

[171] *See Fitzgerald,* 374 U.S. at 19 (damages on negligence count are subject to reduction for contributory negligence).

[172] *See Farrell,* 336 U.S. at 516 (aside from gross misconduct or insubordination, what seaman is doing and why and how he is injured does not affect his right to maintenance and cure, but it may affect claims for indemnity or negligence).

usually denied recovery altogether.[173]

Some writers compare the maintenance and cure remedy to remedies provided to land-based employees by state Workmen's Compensation Acts.[174] The two types of remedies are comparable to the extent that both impose liability on the involved employer without regard to fault. Workmen's compensation is a land-based employee's exclusive remedy against his employer and is the result of a legislative quid pro quo arrangement between the employer and the employee whereby the employee obtains a "no fault" remedy in exchange for relinquishing a potentially more lucrative, but more uncertain, negligence action. A seaman is entitled to be paid maintenance and cure, and in addition, can pursue a claim based upon negligence and the unseaworthiness of his employer's vessel.[175]

Moreover, seamen can recover and shipowners must pay for any illness that manifests itself during the seaman's employment, without regard to whether the illness was caused by or related to the employment.[176] Under the Mississippi Workmen's Compensation Act, an employer is only liable for illness arising during the course and scope of an employee's employment.[177]

Maintenance is a per diem living allowance paid to seamen.[178] Theoretically, the shipowner is required to furnish

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[173] *See id.* (gross misconduct bars recovery). *But cf.* Aguilar v. Standard Oil Co., 318 U.S. 724, 730-31 (1943) (negligence or acts short of culpable misconduct by seaman will not relieve shipowner of responsibility for maintenance and cure); Garrett v. Moore-McCormack Co., 317 U.S. 239, 243-44 (1942) (contributory negligence no bar to proceeding in admiralty or under Jones Act).

[174] *See* G. GILMORE & C. BLACK, *supra* note 8, at 281-82 (comparing maintenance and cure with workmen's compensation).

[175] *See Fitzgerald*, 374 U.S. at 18 (actions for unseaworthiness and maintenance and cure should not be split); Pacific S.S. Co. v. Peterson, 278 U.S. 130, 137-38 (1928) (maintenance and cure may be brought with action for negligence or unseaworthiness).

[176] *See* Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938) (duty to provide maintenance and cure not restricted to cases where seaman's employment is the cause of the injury or illness).

[177] MISS. CODE ANN. § 71-3-7 (1972) makes compensation payable for disability or death from injury or occupational disease arising out of and in the course of employment, that is, when there is evidence of a direct causal connection between the work performed and the disease.

[178] Pelotto v. L & N Towing Co., 604 F.2d 396, 400 (5th Cir. 1979). The right of an injured seaman to maintenance and cure is a form of compensation that arises out of the contract of employment. Vaughan v. Atkinson, 369 U.S. 527, 531-33 (1962). The ship-

the same room and board as provided by the vessel.[179] For years, maintenance was awarded at the fixed rate of eight dollars per day.[180] More recent decisions have awarded fifteen dollars per day, realizing that this sum more reasonably supports an injured or ill seaman.[181]

A shipowner is also obligated to "cure" seamen who are injured or rendered ill in the service of the vessel by providing therapeutic, medical, drug, and hospital expenses.[182] This obligation is often satisfied by having seamen obtain treatment at no cost to the shipowner at public health service hospitals.[183]

Shipowners must voluntarily pay maintenance and cure and the failure to do so, if shown to be wilfull, unreasonable, or the result of bad faith, will subject a shipowner to liability for attorney's fees incurred by the seaman in collecting unpaid maintenance or cure.[184] Recalcitrance in paying maintenance and cure

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owner is required to furnish the seaman with food and lodging of the quality and kind he would receive had he been able to continue working on board the vessel. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938). Where the owner does not furnish in kind, he must pay a daily stipend for the maintenance of the seaman. The amount necessary for maintenance may vary depending both on what was furnished on the ship and the cost of equivalents in port. Tate v. American Tugs, Inc., 624 F.2d 869, 870 (5th Cir. 1980). Thus, the determination of the proper amount is a factual question. Caulfield v. AC & D Marine, Inc., 633 F.2d 1129, 1132 (5th Cir. 1981).

[179] Tate v. American Tugs, Inc., 624 F.2d 869, 870 (5th Cir. 1980).

[180] *See, e.g.*, Varady v. D & D Catering Serv., Inc., 450 F. Supp. 182, 185 (E.D. La. 1978) (awarding maintenance of $8.00 per day); Kelloch v. S & H Subwater Salvage, Inc., 397 F. Supp. 738, 741 (E.D. La. 1972) (same), *modified*, 473 F.2d 767 (5th Cir. 1973); Burke v. Pacific Towboat & Salvage Co., 208 F. Supp. 623, 626 (N.D. Cal. 1962) (same).

[181] *See* Robinson v. Plimsoll Marine, Inc., 460 F. Supp. 949, 950 (E.D. La. 1978) (holding that proper maintenance is $15.00 per day).

[182] *E.g.* Pelotto v. L & N Towing Co., 604 F.2d 396, 400 (5th Cir. 1979) (cure involves payment of therapeutic, medical, and hospital expenses); *cf.* Travis v. M.V. Rapids Cities, 315 F.2d 805, 813 (8th Cir. 1963) (seaman's travel expenses also recoverable).

[183] A shipowner's obligation to provide cure may ordinarily be discharged by "tendering" to the involved seaman treatment at a Public Service Hospital. Sanford Bros. Boats, Inc. v. Vidrine, 412 F.2d 958, 973-74 (5th Cir. 1969). By refusing such treatment, the seaman forfeits his right to claim cure. On a showing that such treatment is inadequate, no forfeiture occurs. Caulfield v. AC & D Marine, Inc., 633 F.2d 1129, 1133 (5th Cir. 1981). The seaman only forfeits the "cure" that would have been provided had such tender been accepted. Pelotto v. L & N Towing Co. 604 F.2d 396, 403-04 (5th Cir. 1979); *see also* Oswalt v. Williamson Towing Co., 488 F.2d 51, 53 (5th Cir. 1974) (seaman may recover cost of doctor of his choice).

[184] *See* Vaughan v. Atkinson, 369 U.S. 527, 529-30 (1962) (attorney's fees allowed);

can also expose an offending shipowner to damages for suffering and a resulting physical handicap.[185]

B. Persons Entitled to Recover Maintenance and Cure

In early cases, the remedy of maintenance and cure was limited to those crew members who actually embarked on maritime endeavors and were subjected to hazards of maritime employment. The courts have long since abandoned efforts to restrict this remedy. In general, anyone classified as a Jones Act seaman is entitled to be paid maintenance and cure.[186] The tests for determining Jones Act seaman are discussed elsewhere.

C. When is a Seaman "in the Service of His Ship"?

As stated earlier, a seaman is entitled to recover maintenance and cure for injury or illness suffered in the absence of his "gross" misconduct, while "in the service of the ship." Although early sea codes specifically relieved the shipowner from liability for injury or illness incurred where the seaman was on shore without leave,[187] they were silent as to whether maintenance and cure was recoverable by seamen sustaining illness or injury on shore when the seaman was on leave.

In 1943, the Supreme Court decided two consolidated maintenance and cure cases.[188] In the first case, a seaman sustained injury when he was returning to the vessel after shore leave. In

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Kraljir v. Berman Enter., 575 F.2d 412, 414 (2d Cir. 1979) (fees allowed where refusal by shipowner to pay maintenance and cure was wilful); Roberts v. S.S. Argentina, 359 F.2d 430, 431 (2d Cir. 1963) (fees disallowed where no showing of bad faith).

[185] *See* Picou v. American Offshore Fleet, Inc., 576 F.2d 585, 587-88 (5th Cir. 1978) (failure to pay maintenance and cure may be basis for independent tort action); Blanchard v. Cheramie, 485 F.2d 328, 331 (5th Cir. 1973) (same).

[186] Weiss v. Central R.R., 235 F.2d 309, 311 (2d Cir. 1956). Anyone who is a "seaman" is entitled to maintenance and cure where such seaman serves the ship as a result of a contractual relationship, and serves her in respect to navigation. *Id.* at 311-12. The liability for maintenance and cure is owed only to seamen and does not extend to other maritime workers. *See* Baker v. Ocean Systems, Inc., 454 F.2d 379, 383-86 (5th Cir. 1972) (diver-tender was not seaman in contractual relation with shipowner); Smith v. Noble Drilling Co., 272 F. Supp. 321, 322 (E.D. La. 1967) (owed only to seamen).

[187] *See* 30 F. Cas. 1171-1216 app. (1897) (compilation of sea codes) (liability limited where seamen injured off ship without leave).

[188] Aguilar v. Standard Oil Co., 318 U.S. 724, 734-36 (1943) (consolidating two lower court cases).

the other suit, a seaman was injured while he was leaving the vessel to commence shore leave. Maintenance and cure was sought in each case, and in each instance the shipowner denied being liable to the involved seamen. The shipowner's position in each case was that injuries occurring under these circumstances were not "in the service of the ship." Reasoning that shore leave itself furthered the objectives of the shipowner, the Court ruled that injuries sustained while leaving or returning to the vessel, at the beginning or at the conclusion of shore leave, occurred while the seaman was in the ship's service,[189] thus, subjecting the shipowner to maintenance and cure liability for such injuries.

Warren v. United States[190] further extended the shipowner's obligation to supply maintenance and cure. While on shore leave, and after consuming a bottle of wine in a Naples dance hall, Warren walked onto an unprotected ledge, leaned over to look below, and fell. Warren contended that this injury occurred while he was "in the service of the ship." The shipowner contended that its obligation to provide maintenance and cure did not extend to injuries and illnesses incurred while the seaman was enjoying his shore leave, but was limited to those instances where the seaman was either leaving or returning to the vessel. Maintenance and cure, the Court held, is just as applicable to "injuries received during the period of relaxation while on shore, as it is to those while reaching it." Accordingly, Warren recovered maintenance and cure at the shipowner's expense.[191]

The factual determination of whether a seaman is in the service of the vessel, lower courts have ruled, does not depend upon whether a seaman is ashore at the time of injury or illness, but whether the seaman is "answerable to the call of duty."[192] A seaman is answerable to the call of duty and entitled to recover maintenance and cure for injury or illness occurring while the seaman is ashore and off duty if the seaman is under an obliga-

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[189] *Id.* at 734-36.

[190] 340 U.S. 523 (1951).

[191] *Id.* at 530.

[192] Baker v. Ocean Systems, Inc., 454 F.2d 379, 385 (5th Cir. 1972); Sellers v. Dixilyn Corp., 433 F.2d 446, 448 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).

tion to return to the ship in response to a call from his shipowner-employer.[193]

D. Duration of Maintenance and Cure

The question of how long a seaman is entitled to be paid maintenance and cure is important. Early cases suggested that a shipowner's obligation to "cure" an injured or ill seaman ended on termination of the voyage or the contract of employment.[194] In *Calmar Steamship Corp. v. Taylor*,[195] a seaman contracted Buerger's disease during his employment but the seaman's employment did not contribute to the onset of the disease. Rejecting the contention that maintenance and cure was recoverable for the duration of the seaman's life, the Supreme Court ruled that it was recoverable for such time "after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care and medical treatment."[196] "Beyond this," the Court stated, "we think there is no duty, at least where the illness is not caused by the seaman's service."[197]

In *Farrell v. United States*,[198] Farrell was injured while returning to the vessel after shore leave. Farrell was totally blind, suffered from post-traumatic convulsions, and required future medical care. He sought to recover maintenance and cure for life on the basis that his disability was employment connected. The *Farrell* Court refused to obligate the shipowner to pay Farrell maintenance and cure for life, and in so doing ruled that no distinction existed, in terms of the duration of a shipowner's maintenance and cure obligation, between employment and non-employment related illness and injury.[199]

Farrell and *Taylor* both stand for the proposition that a

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[193] Baker v. Ocean Systems, Inc., 454 F.2d 379, 385 (5th Cir. 1972); Sellers v. Dixilyn Corp., 433 F.2d 446, 448-49 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).

[194] *See* Nevitt v. Clarke, 18 F. Cas. 29, 33 (S.D.N.Y. 1846) (No. 10,138) (right to medical treatment at expense of shipowner ended on termination of voyage).

[195] 303 U.S. 525 (1938).

[196] *Id.* at 530.

[197] *Id.*

[198] 336 U.S. 511 (1949).

[199] *Id.* at 515-17.

seaman's right to maintenance and cure terminates when maximum medical improvement has been reached, and lower courts have routinely proscribed this as the date when the maintenance and cure obligation ceases.[200] Therefore, the cut-off date for both maintenance and cure is not the day that a seaman recovers sufficiently so as to be able to resume his old employment but the date he reaches maximum cure.[201]

In *Vella v. Ford Motor Co.*,[202] however, the Court adopted another date for concluding a shipowner's obligation to pay maintenance and cure. Vella, a seaman, fell and suffered a blow to his head on April 4, 1968. He was discharged and left the ship on June 29, 1968. Vella's condition was permanent and the ship's medical witnesses testified that his disability became incurable immediately after the accident. The court of appeals ruled that the shipowner's obligation to pay maintenance and cure terminated when maximum recovery was reached and since Vella's condition was permanent immediately after the accident, Vella's complaint seeking maintenance and cure was dismissed.[203] The Supreme Court reversed, holding that the seaman's interest is best served by ordering maintenance and cure to be paid through the date that the seaman's disability is declared to be permanent, that is, incurable.[204] Accordingly, a sea-

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[200] *See* Coulter v. Ingram Pipeline, Inc., 511 F.2d 735, 738 (5th Cir. 1975) (seaman's right to maintenance and cure continues until maximum medical improvement is reached); Price v. Moster, 483 F.2d 275, 278 (5th Cir. 1973) (same); Myles v. Quinn Menhaden Fisheries, Inc., 302 F.2d 146, 150 (5th Cir. 1962) (same).

[201] Brown v. Aggie & Miller, Inc. 485 F.2d 1293, 1296 (5th Cir. 1973).

[202] 421 U.S. 1 (1975).

[203] *Id.* at 3.

[204] *Id.* at 3-5. Justice Brennan, speaking for the Court, said:

> Denial of maintenance and cure when the seaman's injury, though in fact permanent immediately after the accident, is not medically diagnosed as permanent until long after its occurrence would obviously disserve and frustrate the "combined object of encouraging marine commerce and assuring the well-being of seamen." A shipowner might withhold vitally necessary maintenance and cure on the belief, however well or poorly founded, that the seaman's injury is permanent and incurable. Or the seaman, if paid maintenance and cure by the shipowner, might be required to reimburse the payments, if it is later determined that the injury was permanent immediately after the accident. Thus uncertainty would displace the essential certainty of protection against the ravages of illness and injury that encourages seamen to undertake their hazardous calling.

man is entitled to maintenance and cure from the date of his injury until maximum medical improvement is reached or until his condition is declared to be permanent.

E. Wilful Misconduct Will Defeat a Maintenance and Cure Claim

A seaman can lose his right to recover maintenance and cure through his own wilful misconduct. In *Aguilar v. Standard Oil Co.*,[205] the Court observed:

> Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his [maintenance and cure] protection . . . . The traditional instances are veneral disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore.[206]

In *Farrell v. United States*,[207] the Supreme Court ruled:

> The seaman could forfeit the right [to maintenance and cure] only by conduct whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct. On the other hand, the master knew he must maintain and care for even the erring and careless seaman, much as a parent would a child.[208]

Intoxication alone does not deprive a seaman of the right to recover maintenance and cure, since courts have said that intoxication is often regarded as "a classic predisposition of sailors ashore."[209] Before denying maintenance and cure benefits to inebriated sailors, some courts require an element of wilfulness to be shown.[210]

While seamen are often disposed to get drunk, courts have

Id. at 4.

[205] 318 U.S. 724 (1943).

[206] *Id.* at 731 (citations omitted).

[207] 336 U.S. 511 (1949); *see supra* notes 198-99 and accompanying text.

[208] *Id.* at 516.

[209] *Aguilar*, 318 U.S. at 731.

[210] *E.g.*, Wills v. American President Lines, Ltd., 1964 A.M.C. 81, 87 (Sup. Ct. San Fran. 1963) (must show wilfulness to deny maintenance and cure).

apparently concluded that they are not necessarily disposed to participate in illicit sexual activity. Accordingly, the contracting of veneral disease while on shore leave and subject to the call of the vessel, is not regarded as being in the ship's service, and the shipowner is not liable for maintenance and cure in "correcting" this problem. As noted in *Aguilar*, "wilful misbehavior" or "deliberate act[s] of indiscretion" will serve to deprive a seaman of the right to recover for maintenance and cure. Activity that results in the contracting of veneral disease, the *Aguilar* Court specifically ruled, is a classic example of "wilful misbehavior" and constitutes a "deliberate act of indiscretion."[211]

Illicit sexual activity while on shore leave often has consequences other than the contraction of veneral disease. For example, a seaman, while on shore leave and arguably subject to the call of the vessel, had a "contract" dispute with a prostitute's male companion who was undertaking to physically enforce his understanding of the prostitute's end of the bargain. The seaman jumped from the window of the brothel, broke his leg, and sued the shipowner seeking to recover for maintenance and cure. The seaman's indiscretion was rejected as a defense to this claim and maintenance and cure was awarded.[212]

In a similar, equally colorful case, a seaman had sexual relations with a prostitute and subsequently had a financial disagreement with her male companion. Unlike the earlier example, the seaman was not injured escaping; he was injured in the ensuing melee. Maintenance and cure was denied on the theory that the seaman had been guilty of "wilful misbehavior" or a "deliberate act of indiscretion."[213] The two cases were distinguished on the questionable basis that in the first instance the seaman had committed no immoral act, though he had apparently contracted for one, whereas in the latter one, an immoral act was actually consummated.

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[211] 318 U.S. at 730-31; *see* Zambrano v. Moore-McCormack Lines, 131 F.2d 537, 538 (2d Cir. 1942) (illness arising from vices or wilful misconduct of seaman not compensated).

[212] Koistiner v. American Export Lines, 192 Misc. 1060, 83 N.Y.S.2d 297, 301 (N.Y. Civ. Ct. 1948).

[213] Matthews v. Gulf & S. Am. S.S. Co., 226 F. Supp. 555, 556 (E.D. La.), *aff'd*, 339 F.2d 702 (5th Cir. 1964).

F. Wilful Failure to Disclose Preexisting Injury or Illness.

As stated previously, the right to maintenance and cure extends not only to injury but also includes illness. If the illness manifests itself while the seaman is in the ship's service, the shipowner is obligated to provide maintenance and cure. An exception to this rule exists in cases where the seaman knowingly conceals an injury or illness.[214] The courts have distinguished between the "nondisclosure" of a preexisting illness and the "concealment" of such a condition.[215] If the seaman knew of an illness or injury but did not feel that it would affect his performance and thus did not disclose it, the shipowner is liable for the maintenance and cure after the illness manifests itself.[216] Where the seaman intentionally conceals the fact of a preexisting illness, maintenance and cure is generally denied.[217]

IV. Death Actions

By enacting the Jones Act[218] and the Death on the High Seas Act,[219] Congress has afforded the survivors of seamen the right to recover damages for wrongful death. The Jones Act, as a wrongul death statute, supersedes any otherwise applicable state death statute,[220] and provides that the personal representative of a covered seaman may maintain an action for damages at law with the right of trial by jury. A deceased seaman's personal representative, when suing under the Jones Act, acts for the desig-

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[214] *See* McCorpen v. Central Gulf S.S. Co., 396 F.2d 547, 549 (5th Cir.) (seaman's claim denied where he failed to disclose preexisting disability), *cert. denied,* 393 U.S. 894 (1968).

[215] *See* Gauthier v. Crosby Marine Servs., Inc., 499 F. Supp. 295, 298 (E.D. La. 1980) (if seaman believes in good faith that he is fit for duty, maintenance and cure is proper notwithstanding preexisting illness); *see also* Couts v. Erickson, 241 F.2d 499, 503 (5th Cir. 1957) (seaman acted in good faith).

[216] *See* Couts v. Erickson, 241 F.2d 499, 503 (5th Cir. 1957) (seaman has right to rely on doctor's assessments that he was fit for duty); Ahmed v. United States, 177 F.2d 898, 899-900 (2d Cir. 1949) (no fraudulent concealment).

[217] *See* Sulentich v. Interlake S.S. Co., 257 F.2d 316, 319-20 (7th Cir.) (plaintiff knowingly made material misrepresentation), *cert. denied,* 358 U.S. 885 (1958).

[218] 46 U.S.C. § 688 (1976).

[219] *Id.* §§ 761-768.

[220] *See, e.g.,* Lindgren v. United States, 281 U.S. 38, 44, 47 (1930) (Jones Act claim exclusive and supersedes state death statute).

nated survivors who are named in the statute.[221] If no beneficiary survives the deceased seaman, the personal representative cannot maintain an action.[222] Courts have uniformly ruled that Jones Act wrongful death damage recoveries are limited to pecuniary loss.[223]

The Death on the High Seas Act[224] (DOHSA) provides a wrongful death remedy for accidents occurring at sea and more than a marine league (three miles) from shore. This statute grants to a seaman's personal representative a cause of action for wrongul death for the benefit of specifically designated beneficiaries. Like the Jones Act, death recoveries under DOHSA are limited to pecuniary loss, though this is the product of statutory language as opposed to judicial decision.[225]

In *Lindgren v. United States,*[226] a seaman was killed while working on a vessel within the territorial waterways adjacent to the State of Virginia, and his administrator sued. The Court held that the Jones Act was the administrator's sole remedy, and that no cause of action existed under Virginia's wrongul death statute, or the warranty of seaworthiness.[227]

The Court in *Lindgren* did not decide whether the Jones Act superseded DOHSA. Lower courts, following *Lindgren,* ruled that a seaman killed outside state waterways could sue under both the Jones Act and DOHSA.[228] Since DOHSA allowed recovery for unseaworthiness,[229] the survivors of seamen "fortuitously" killed more than three miles from a state's coast were afforded a no fault remedy, while seamen killed within three

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[221] *Id.* at 41.

[222] *Id.*

[223] *E.g.,* The M.V. Elaine Jones, 480 F.2d 11, 31-32 (5th Cir. 1973) (suitors under Jones Act can recover damages for pecuniary loss but not for survivors' grief); *see infra* note 247.

[224] 46 U.S.C. §§ 761-768 (1976).

[225] Section 762 limits damages to "a fair and just compensation *for the pecuniary loss* sustained by the persons for whose benefit the suit is brought . . . ." *Id.* § 762 (emphasis added).

[226] 281 U.S. 38 (1930).

[227] *Id.* at 43-48. *Lindgren* was reaffirmed in Gillespie v. United States Steel Corp., 379 U.S. 148, 154-55 (1964).

[228] *E.g.,* Civil v. Waterman S.S. Corp., 217 F.2d 94, 97 (2d Cir. 1954) (election not required; recovery under one act does not bar recovery under the other).

[229] Kerman v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958).

miles were required to prove negligence.

Moreover, DOHSA's beneficiaries included the deceased's wife, husband, parent, child or dependent relative. Jones Act beneficiaries consisted of a deceased seaman's spouse and children, or his parents, or his dependent next of kin. Under DOHSA, therefore, all designated family members who were dependent on a deceased seaman could share in any recovery obtained, while under the Jones Act the existence of a prior class of beneficiaries barred recovery by members of a subsequent class. Again, the fortuitous occurrence of a death more than three miles from shore would govern who were death beneficiaries.

DOHSA, as stated, is not applicable to maritime accidents occurring within state waters.[230] Persons who did not qualify as Jones Act seamen had to rely on state wrongful death statutes. Some state wrongful death acts did not recognize unseaworthiness as a basis for recovery.[231] If a maritime worker happened to be killed in the territorial waters of such a state, his remedy would be different from that of a worker killed in a state whose wrongful death act recognized unseaworthiness. Moreover, some states allowed recovery for "general" damages, that is, pain and suffering and survivors' grief for wrongful death, while others limited recoveries to pecuniary loss. Again, if a maritime worker was killed in a state allowing recovery for "general" non-pecuniary damages, his representative could recover elements of damage not available to Jones Act seamen, persons entitled to sue under DOHSA, or persons killed in states with wrongful death acts that did not permit such recovery.

Obviously, these material differences, to cite only a few, in maritime wrongful death remedies needed judicial redress. In an effort to attempt to fashion a uniform maritime death remedy, the Supreme Court decided *Moragne v. States Marine Lines, Inc.*[232]

Moragne, a longshoreman, was killed in a maritime accident occurring on the navigable waters of the State of Florida. Since

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[230] 46 U.S.C. § 767 (1976).

[231] Moragne v. States Marine Lines, Inc., 398 U.S. 375, 398-99 (1970).

[232] 398 U.S. 375 (1970).

longshoremen had no cause of action under the Jones Act and since DOHSA was inapplicable because of the location of this casualty, Moragne's widow brought suit under Florida's Wrongful Death Act claiming both negligence and unseaworthiness. Florida law did not recognize unseaworthiness as a basis for liability under its wrongful death statute, and as a consequence, Moragne's widow's unseaworthiness suit was dismissed.[233] The Supreme Court ruled that "an action does lie under general maritime law for death caused by violation of maritime duties."[234] In so ruling, the Court expressly overruled *The Harrisburg*,[235] thereby scuttling eighty-four years of precedent. The Supreme Court in *Moragne* declined to decide at least two questions in connection with this "new" wrongful death cause of action: what elements of damage were recoverable and who could recover for such damages.

Following *Moragne*, the Supreme Court decided *Sea-Land Services, Inc. v. Gaudet*.[236] Gaudet, like Moragne, was a longshoreman who was injured and subsequently died while working in state territorial waters. Both the Jones Act and DOHSA were unavailable to Gaudet's widow. Expressing dissatisfaction for the narrow wrongful death relief available under the Jones Act and DOHSA, both of which limit recovery to pecuniary loss, the Court in *Gaudet* reaffirmed its earlier ruling in *Moragne*.[237] *Gaudet* determined that the elements of recoverable damages for an unseaworthiness-caused death included loss of support, loss of services, funeral expenses, and loss of society.[238] Loss of

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[233] *Id.* at 376.

[234] *Id.* at 409.

[235] In The Harrisburg, 119 U.S. 199, 201 (1886), the Supreme Court held that general maritime law did not afford a cause of action for wrongful death.

[236] 414 U.S. 573 (1974).

[237] The *Gaudet* Court stated that *Moragne* held "that an action for wrongful death based on unseaworthiness is maintainable under federal maritime law, but left the shaping of the new nonstatutory action to future cases." *Id.* at 574.

[238] *Id.* at 583. The Court discussed the elements of recoverable damages:

> Our review of those authorities, and the policies of maritime law, persuade us that, under the maritime wrongful-death remedy, the decedent's dependents may recover damages for their loss of support, services, and society, as well as funeral expenses.
>
> Recovery for loss of support has been universally recognized, and includes all the financial contributions that the decedent would have made to his de-

society, of course, is a non-pecuniary loss that is not recoverable under either the Jones Act or DOHSA.

The Court then decided *Mobil Oil Corp. v. Higginbotham.*[239] In *Higginbotham,* a helicopter crashed outside Louisiana's territorial waters in the Gulf of Mexico, killing the pilot and three passengers. In the resulting wrongful death action brought by the passengers' widows under the Death on the High Seas Act and general maritime law, the district court awarded damages for the plaintiffs' pecuniary loss, but declined to make an award for loss of society.[240] Relying on *Gaudet,* the Fifth Circuit reversed, holding that the plaintiffs were entitled to recover damages for loss of society.[241]

The Supreme Court acknowledged that the development of the general maritime wrongful death action in *Moragne* and *Gaudet* had led many to conclude that loss of society and other non-pecuniary damages were recoverable in all maritime wrongful death actions.[242] In reversing the Fifth Circuit, the Court reasoned that, by enacting the Death on the High Seas Act, Congress had determined that wrongful deaths occurring more than three miles from shore were to be compensated solely by awarding "a fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought."[243] Both *Moragne* and *Gaudet* dealt with deaths of longshoremen

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pendents had he lived. Similarly, the overwhelming majority of state wrongful-death acts and courts interpreting the Death on the High Seas Act have permitted recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had not the parent been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.

Compensation for loss of society, however, presents a closer question. The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection.

Id. at 584-85 (citations omitted).

[239] 436 U.S. 618 (1978).

[240] *Id.* at 619. The district court opinion is reported at 360 F. Supp. 1140 (W.D. La. 1973).

[241] 436 U.S. at 619-20.

[242] *See,* Law v. Sea Drilling Corp., 523 F.2d 793, 795 (5th Cir. 1973) (holding wrongful death includes loss of society).

[243] 436 U.S. at 628 (quoting 46 U.S.C. § 762 (1976) (emphasis added)).

occurring less than three miles from shore and, therefore, were not governed by DOHSA.

In *Higginbotham,* the Court was called upon to decide which measure of damages to apply in a death action arising on the high seas: the rule chosen by Congress when it enacted DOHSA or the rule chosen by the Court in *Gaudet.*[244] The Court concluded that *Gaudet* was distinguishable from *Higginbotham,* expressly stating that *Gaudet* wrongful death damage recoveries applied "only to coastal waters."[245] The Court further ruled that the pecuniary loss limitations on recoverable damages prescribed by Congress in DOHSA were controlling in all maritime deaths beyond the three-mile limit.[246]

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[244] The Court stated:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages . . . . The Act does not address every issue of wrongful-death, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.
>
> Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements . . . . There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.

436 U.S. at 625-26 (citations omitted).

[245] *Id.* at 623. The Court observed:

> Among the issues addressed in *Gaudet* was the measure of survivors' damages. The Court held that awards could include compensation for loss of support and services, for funeral expenses, and for loss of society, but not for mental anguish or grief. The Court recognized that DOHSA, which compensates only for pecuniary losses, did not allow awards for loss of society. But the accident in *Gaudet,* like that in *Moragne,* took place in territorial waters, where DOHSA does not apply. The Court chose not to adopt DOHSA's pecuniary-loss standard; instead it followed the "clear majority of States" and "the humanitarian policy of the maritime law," both of which favored recovery for loss of society. In sum, the Court made a policy determination in *Gaudet* which differed from the choice made by Congress when it enacted the Death on the High Seas Act.

Id. at 622 (emphasis added) (citations omitted).

[246] *Id.* at 625. The Supreme Court, in American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980), held that general maritime law authorizes the spouse of a harbor worker

Ivy v. Security Barge Line[247] presented the Fifth Circuit with its first opportunity to review the effect of *Higginbotham* on a Jones Act wrongful death action. In *Ivy,* a crew member on a towboat fell overboard and drowned while the vessel was operating on the Lower Mississippi River. Ivy's father instituted a wrongful death action under both the Jones Act and general maritime law. The jury found the shipowner to be guilty of Jones Act negligence. The shipowner's vessel, however, was determined to be seaworthy. The district court, in a pre-*Higginbotham* ruling, ruled that Ivy's parents could recover for their loss of support, services, *and society* resulting from the death of their son.[248]

While *Ivy* was on appeal, *Higginbotham* was decided. In light of *Higginbotham,* the Fifth Circuit was presented with the issue of whether damages for non-pecuniary losses (specifically loss of support) could be recovered in a Jones Act wrongful death action occurring within the territorial waters of the United States. The court ruled that non-pecuniary damages, such as loss of society, were *not* recoverable and the Jones Act decedent's recovery was limited to pecuniary loss.[249]

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injured aboard a vessel to maintain an action for damages for loss of society. *Id.* at 276-83. The Fifth Circuit followed *Alvez* in Cruz v. Henry Int'l Co., 638 F.2d 719 (5th Cir. 1981), by holding that the spouse of a seaman whose injuries are attributable to the unseaworthiness of a vessel has a general maritime law cause of action for loss of his society. *Id.* at 721. When a death is caused in territorial waters by unseaworthiness, the survivors may recover damages for loss of society under general maritime law, in addition to any recovery permitted by the Jones Act. Smith v. Ithaca Corp., 612 F.2d 215, 226 (5th Cir. 1980).

[247] 585 F.2d 732 (5th Cir. 1978), *aff'd on rehearing,* 606 F.2d 524 (1979) (en banc).

[248] 585 F.2d at 735.

[249] *Id.* at 739. Judge Rubin, speaking for the court, stated:

> Our sole remaining task, therefore, is to consider whether this limitation on Jones Act recoveries extends to deaths occurring within the territorial limits of the United States. In failing to differentiate between the Jones Act plaintiff and those seeking recovery only under DOHSA and general maritime law, the Court has indicated that, as a policy matter, it will not distinguish between the statutorily imposed limitation on damages in DOHSA and the judicially created restriction on damages under the Jones Act. To allow the recovery of non-pecuniary damages under the Jones Act merely because the accident occurred within territorial waters would not only be inconsistent with this policy and negate years of firmly established legal precedent, but would create two separate Jones Act remedies, each applicable only within its own geographical sphere. It would be anomalous indeed if we interpreted the Supreme Court's

It must be remembered that *Ivy* was a Jones Act negligence case *only*. Unseaworthiness had been decided adversely to the seaman's representatives by the jury. In a footnote, the *Ivy* court indicated that where a seaman combined both a Jones Act negligence death suit with one based on unseaworthiness, the seaman could nonetheless recover only pecuniary damages.[250]

The Fifth Circuit subsequently considered *Ivy* en banc.[251] While the en banc court reached the same result as did the original panel that decided *Ivy*, the aforementioned footnote was deleted from the court's en banc opinion. In another footnote, the

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opinion to encourage the creation of needless disuniformity based solely on the place of the accident, bringing the law full circle from the days prior to *Moragne*. We have no authority to change the course thus set for us, no matter what star we would have chosen to steer by were we plotting the voyage. The award of nonpecuniary damages under the Jones Act here was improper and cannot stand.

Id. at 738-39.

[250] The court observed:

> We are not unaware of the implications of this result, mandated though it is by *Higginbotham*. If an explosion occurred aboard a vessel in the Port of New Orleans, caused by both negligence and unseaworthiness, resulting in the death of a passenger, a longshoreman employed by a third party stevedore, and a Jones Act seaman, the recovery by the representative of each would be based on a different standard and be for a different amount: (a) The passenger's representative would have an action under *Moragne-Gaudet* including damages for loss of services; query: could they join a wrongful death action under Louisiana law . . . and also recover for survivor's grief? (b) The longshoremen's representative would have a 905(b) action based on land-type negligence standards. The 905(b) claim is exclusive, but the statute does not state the measure of damages. Because the negligence is land-type, would the measure of damages likewise be land-analogized and include grief, as allowed under [the Louisiana wrongful death statute.] Or does *Higginbotham* limit their recovery to pecuniary loss? (c) Finally, the Jones Act seaman's survivors receive only reimbursement for pecuniary losses. They, presumably, could not join the state death claim with their Jones Act claim.
>
> If the passengers representative could cumulate a state death action with the maritime-type action, or the longshoremen's administrator could recover land-measured damages, then we would be back to the situation criticized in *Moragne* in that the recovery measure would be different if the explosion occurred in Florida waters.
>
> If the deaths of these persons, each having the same status as one of the three in the first hypothesis, were caused by unseaworthiness and negligence on the high seas, then similar questions would arise and like contradictions might ensue.

Id. at 738 n.8 (citations omitted).

[251] 606 F.2d 524 (5th Cir. 1979).

en banc court stated:

> A seaman may, of course, join a claim for unseaworthiness under general maritime law with his Jones Act claim for negligence. We do not here reach the issue of whether after *Higginbotham* nonpecuniary damages may be recovered in such an action if unseaworthiness if found. Ivy recovered solely for negligence. General maritime law does not provide a cause of action for negligence to a seaman against his employer supplemental to that created by the Jones Act; *The Osecola* has never been overruled. Therefore, to the extent that *Gaudet* remains seaworthy after *Higginbotham,* it can have no impact when, as here, no general maritime law (*Moragne*-type) claim is involved.[252]

This action by the court strongly hinted that in a death action in which unseaworthiness is found to have caused or contributed to the maritime worker's death, *Gaudet* damages will be awarded even though the involved death suit also seeks recovery under the Jones Act. The Fifth Circuit has so ruled in two recent decisions.[253]

Conclusion

Maritime personal injury and death litigation continues to produce what seems to be an endless number of new, novel, often complex, and sometimes conflicting concepts of law. On what seems to be a weekly basis, vessels are deemed to be unseaworthy for reasons never previously considered; Jones Act negligence is found to exist where it never did before; mainte-

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[252] *Id.* at 528 n.8.

[253] Smith v. Ithaca Corp., 612 F.2d 215, 226 (1980); Hlodan v. Ohio Barge Lines, Inc., 611 F.2d 71, 76 (5th Cir. 1980). In *Hlodan,* the court framed the issue as being: "The question here is whether a Jones Act claim joined with a general maritime claim bars the award of nonpecuniary damages, where the cause of action arose out of an occurrence on inland waters." *Id.* at 74.

The court ruled:

> We conclude, therefore, that *Mobil Oil Corp. v. Higginbotham* has no bearing upon this Circuit's rule that a Jones Act claim may be joined with a wrongful death claim for nonpecuniary damages based on general maritime law, when the incident does not arise on the high seas, and that nonpecuniary damage may be recovered under the unseaworthiness claim.

Id. at 75.

nance and cure is increased in amount, is given to more and different people, and is ordered to be paid for longer durations.

The attorney who practices in this area with some semblance of regularity—whether he or she approves of these "trends"—indeed is challenged to keep abreast of these recurring developments. Bewilderment is a word often used by both the non-admiralty and admirality practitioner, and this sentiment is certainly understandable.

Hopefully this article will be of some assistance, perhaps as a beginning research tool, to those who wish to acquire a basic, fundamental understanding of the doctrines available to seamen who are killed, injured, or become ill during maritime employment. At the outset, the reader was cautioned that this article did not purport to deal comprehensively with seamen's remedies. That admonishment is, in closing, reaffirmed.

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1981 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

Decisions rendered by the Mississippi Supreme Court in the area of administrative law[1] during the 1981 term focused primarily on the

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[1] Other decisions of the supreme court in the area of administrative law that are not discussed textually include: (1) *School Boards:* Brantley v. Surles, 404 So. 2d 1013, 1017-18 (Miss. 1981) (evidence was sufficient to show that dismissal of manager of school cafeteria resulted from complaints against cafeteria and not due to her son's attendance of a private school); Cox v. Thomas, 403 So. 2d 135, 137-38 (Miss. 1981) (chancery court limited to appellate review of the records made before school board under the Public Schools Fair Dismissal Act; filing original bill of complaint improper); Holliday v. West Point Mun. Separate School Dist., 401 So. 2d 1296, 1301 (Miss. 1981) (ample evidence supported chancellor's finding of school principal's incompetence under MISS. CODE ANN. § 37-9-59 (Supp. 1981)); Tutwiler v. Jones, 394 So. 2d 1346, 1348-49 (Miss. 1981) (despite patent ambiguity in MISS. CODE ANN. § 37-9-59 (Supp. 1981), school district superintendent may be removed upon being found guilty of one or more derelictions provided by the statute). (2) *Employment Security Commission:* Mississippi Employment Sec. Comm'n v. Swilley, 408 So. 2d 61, 62 (Miss. 1981) (worker's refusal to accept work at less than former rate of pay disqualified him from receiving unemployment benefits; worker was not available for work as required by MISS. CODE ANN. § 71-5-511 (Supp. 1981)); Tate v. Mississippi Employment Sec. Comm'n, 407 So. 2d 109, 111-12 (Miss. 1981) (when hours reduced to point that child-care expense exceeds earnings, voluntary termination of employment was for "good cause" under MISS. CODE ANN. § 71-5-513 (Supp. 1981)); Mississippi Employment Sec. Comm'n v. Benson, 401 So. 2d 1303, 1305 (Miss. 1981) (unemployment benefits denied when employee admittedly quit because volume of work not to his satisfaction); Mississippi Employment Sec. Comm'n v. Georgia-Pacific Corp., 394 So. 2d 299, 301-03 (Miss. 1981) (injunction to prevent commission from determining, for purposes of awarding unemployment benefits, whether lockout of employees was justified did not bar action for review of eligibility of claimants). (3) *State Bar:* Netterville v. Mississippi State Bar, 404 So. 2d 1026, 1029 (Miss. 1981) (attorney not entitled to attorney's fees and other reasonable expenses incurred in defense of disciplinary proceedings following dismissal of proceedings brought by state bar); Netterville v. Lear Siegler, Inc., 397 So. 2d 1109, 1113 (Miss. 1981) (person filing complaint against attorney is accorded absolute privilege; no lawsuit may be brought against him so long as statements are made within the course and framework of the disciplinary process and are reasonably relevant to the complaint); Harris v. Mississippi State Bar, 393 So. 2d 1307, 1308-10 (Miss. 1981) (violations of disciplinary rules pertaining to maintaining integrity and competence of legal profession, misconduct, fees for legal services, failing to act competently, and failing to represent a client zealously in several suits warrants one suspension). (4) *Other Boards and Commissions:* Lambert v. Mississippi Limestone Corp., 405 So. 2d 131, 132 (Miss. 1981) (since rental of storage facilities does not constitute public storage warehouse, rental income not subject to five per cent sales tax); City of Oxford v. Inman, 405 So. 2d 111, 113-14 (Miss. 1981) (evidence insufficient to warrant rezoning since city did not prove changed conditions in the area and public need for rezoning);

application of the Mississippi Workmen's Compensation Act.[2] The following textual discussion will treat three workmen's compensation decisions that respectively allowed a section 9(i) compromise statement to be reopened under section 21,[3] rejected a common law test in an action against an employer for retaliatory discharge,[4] and upheld compensation where an employee was killed by his employer because of a personal dispute.[5] In addition, this commentary will address the court's rejection on due process grounds of the Mississippi State Bar Associa-

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Mississippi Air & Water Pollution Control Permit Bd. v. Pets & Such Foods, Inc., 394 So. 2d 1353, 1354-55 (Miss. 1981) (injunction preventing revocation of permit because of odor upheld where no definite standards with respect to emission of odors promulgated).

[2] Workmen's Compensation Act, ch. 354, 1948 Miss. Laws 507 (codified as amended at MISS. CODE ANN. §§ 71-3-1 to -111 (1972 & Supp. 1981)). Decisions in the workmen's compensation area that are not included in the textual discussion are: Johnson v. Dependants of Roundtree, 407 So. 2d 810, 810-11 (Miss. 1981) (taxi driver's shooting death compensable under positional risk doctrine; driver exposed to special risk of harm because of employment); Staple Cotton Servs. Ass'n v. Russell, 399 So. 2d 224, 227 (Miss. 1981) (where workmen's compensation claimant refuses to sign final report and settlement receipt form, statute of limitations does not commence until claimant receives notice of the filing of unsigned form); Cook Constr. Co. v. Smith, 397 So. 2d 536, 536-37 (Miss. 1981) (when determining whether employee's injury compensable, "in the course of" requirement is satisfied when injury results from activity reasonably incidental to employment; "arising out of" requirement demands only causal connection); Southland Supply Co. v. Patrick, 397 So. 2d 77, 79-81 (Miss. 1981) (claimant who first sought and received workmen's compensation benefits under Mississippi law not precluded from seeking further benefits under Louisiana law); Mid-South Insulation Co. v. Buckley, 396 So. 2d 7, 10-11 (Miss. 1981) (when evidence establishes definite time that occupational disease manifested itself, the insurance carrier is obligated to pay workmen's compensation benefits); Sperry-Vickers, Inc. v. Honea, 394 So. 2d 1380, 1382-84 (Miss. 1981) (claimant compensated despite lack of medical testimony specifically isolating a single cause of occupational disease when such testimony did establish that chemical agents claimant was exposed to on the job, and not elsewhere, could have caused the disease); Auto Owners Ins. Co. v. Dunaway, 394 So. 2d 1362, 1364-65 (Miss. 1981) (although policy in question was purchased in another state, benefits were available under Mississippi Workmen's Compensation Law since carrier's agent specifically agreed that coverage would extend to Mississippi work); Cross Mfg., Inc. v. Lowery, 394 So. 2d 887, 888-90 (Miss. 1981) (in view of express statutory language, the legislature did not intend to except apportionment cases from minimum weekly payments requirement); Georgia-Pacific Corp. v. Crosby, 393 So. 2d 1348, 1350 (Miss. 1981) (right of control and relative nature of the work tests applied in holding that logging company not an independent contractor).

[3] Bailey Lumber Co. v. Mason, 401 So. 2d 696 (Miss. 1981), *noted in* 51 MISS. L.J. 853 (1980-1981); *see infra* notes 32-52 and accompanying text.

[4] Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874 (Miss. 1981), *noted in* 51 MISS. L.J. 575 (1980-1981); *see infra* notes 61-67 and accompanying text.

[5] Kerr-McGee Corp. v. Hutto, 401 So. 2d 1277 (Miss. 1981); *see infra* notes 77-95 and accompanying text.

tion's disciplinary proceedings.[6]

I. Workmen's Compensation

A. *Reopening of Section 9(i) Compromise Settlements*

All states preserve a claimant's right to reopen and modify workmen's compensation awards[7] since, despite the thoroughness of a medical diagnosis, a claimant's condition may worsen or improve considerably.[8] While the legislature's objective of allowing the reopening of awards would be served best through a policy allowing liberal modification of compensation awards, the administrative and practical difficulties of such a course prevent it.[9] The ability to modify awards, therefore, has been limited by both time restraints[10] and by restricting the grounds for reopening.[11]

Section 21[12] of the Mississippi Workmen's Compensation Laws[13] provides that an award may be reopened for a change in condition or because of a mistake in a determination of fact within one year from the date of the last payment of compensation or rejection of the claim.[14] The right to reopen is unaffected by the distinction between awards procured through formal contests and those procured through settlements.[15]

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[6] Netterville v. Mississippi State Bar, 397 So. 2d 878 (Miss. 1981); *see infra* notes 116-25 and accompanying text.

[7] 3 A. Larson, The Law of Workmen's Compensation § 81.10 (1976).

[8] *Id.*

[9] *Id.* Several reasons have been advanced as justification for limiting the time period in which an award may be reopened. First, preserving voluminous case records for lengthy periods of time would create administrative inconvenience. Second, to allow the reopening of old claims would impose a burden on the insurance companies, since liberal modification would render it nearly impossible to calculate the proper reserves that must be set up to meet future liabilities. Finally, limitations are imposed to prevent administrative abuse through the reopening of old cases in which the evidence connecting the disability to the injury is mere guesswork. W. Dodd, Administration of Workmen's Compensation 202-03 (1936).

[10] *See generally* 3 A. Larson, *supra* note 7, § 81.20.

[11] *See generally id.* §§ 81.30-.53.

[12] Section 21 is codified at Miss. Code Ann. § 71-3-53 (1972).

[13] Miss. Code Ann. §§ 71-3-1 to -111 (1972 & Supp. 1981).

[14] *Id.* § 71-3-53 (1972).

[15] *Id.* While reopening statutes apply to both types of cases, the vast majority of cases are settled out of court. 3 A. Larson, *supra* note 7, § 82.00. It is important to note that settlements must be approved by the Mississippi Workmen's Compensation Commission. Miss. Code Ann. § 71-3-29 (1972).

There are two basic types of settlements—lump sum[16] and compromise.[17] Lump sum settlements are not compromises in the usual sense; they are calculated on an annuity basis in compliance with the statutory provisions[18] and are applicable to either a part of or the entire compensation award.[19] Compromise settlements are applicable where it is difficult to ascertain the exact extent of disability.[20] Adjustments are made in the settlement award in consideration of the disputed issues.[21] Additionally, compromise settlements may be paid either periodically or in a lump sum.[22] Both types of settlement agreements must be in the best interest of the claimant and approved by the Workmen's Compensation Commission.[23]

The Mississippi Supreme Court has previously allowed the reopening of lump sum settlements,[24] but prior to 1981, the court had never addressed the issue of whether a compromise settlement originating under section 9(i) of the Mississippi Workmen's Compensation Act[25] could be reopened under section 21.[26] One commentator has concluded

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[16] MISS. CODE ANN. § 71-3-37 (1972).

[17] *Id.* § 71-3-29. Section 71-3-29, which codified § 9(i) of the Workmen's Compensation Act, provides:

> Rules of the commission shall govern compromise payments where the prescribed schedules are not applicable and which, in its discretion, may be made in cases where it is not possible to determine the exact extent of disability, as for example in certain injuries to the back or head. The commission shall also have full authority to adjudicate the disposition of death claims. Commutation and lump sum settlement payments shall be governed by rules of the commission, and shall not be made except when determined to be in the best interest of the injured worker or his dependents, the commission having final authority in such questions.

MISS. CODE ANN. § 71-3-29 (1972).

[18] 3 A. LARSON, *supra* note 7, § 82.71.

[19] W. DODD, *supra* note 9, at 720.

[20] *See* MISS. CODE ANN. § 71-3-29 (1972) (allowing compromise settlements to be made where schedules are not applicable and the exact extent of injury is unknown).

[21] W. DODD, *supra* note 9, at 186.

[22] *Id.*

[23] *See* MISS. CODE ANN. § 71-3-29 (1972) (requiring determination by Commission that compromise settlement is in claimant's best interest before approval); *id.* § 71-3-37 (requiring determination by Commission that lump sum settlement is in claimant's best interest before approval).

[24] *See* Dapsco, Inc. v. Upchurch's Dependent, 243 Miss. 427, 437-38, 138 So. 2d 287, 291 (1962) (lump sum settlement reopened on the basis of fraud in the procurement); Armstrong Tire & Rubber Co. v. Franks, 242 Miss. 792, 799-800, 137 So. 2d 141, 144-45 (1962) (lump sum settlement reopened on the basis of mistake in ascertaining the extent of disability). *See generally* V. DUNN, WORKMEN'S COMPENSATION § 338 (2d ed. 1967).

[25] *See supra* note 17.

[26] Most jurisdictions allow the reopening of all settlements and make no distinction

that in *Dixon v. Green*,[27] the court "intimated" that the compromise settlement could not be reopened absent a showing of fraud or of unfair advantage being taken of the claimant.[28] In *Dixon*, the claimant sought a determination of his disability.[29] The court noted that the claimant, while aware of the doubtful compensability of his case, knowingly signed the compromise settlement agreement, understood the consequences of doing so, and failed to show fraud or undue advantage taken by his employer or insurer. The Workmen's Compensation Commission's order refusing to set aside the compromise was affirmed by the supreme court.[30] The court found it unnecessary to address the question of whether a section 9(i) settlement could be reopened for changed conditions or mistake under section 21.[31]

In 1981, the court rendered *Bailey Lumber Co. v. Mason*,[32] which settled the question left unanswered in *Dixon* in the affirmative. The claimant in *Bailey Lumber*, an illiterate who performed manual labor his entire adult life, sustained a back injury while at work.[33] Two attending physicians classified him as totally disabled,[34] while a third physician, recommended by Bailey Lumber Company's insurance carrier,[35] classified the claimant as suffering from a 25% disability. The

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between lump sum and compromise agreements. *See, e.g.*, Davis v. Birmingham Trussville Iron Co., 223 Ala. 259, 135 So. 455, 456 (1931) (statutory modification applicable to settlements); Fidelity & Casualty Co. v. Parham, 107 Ga. App. 466, 130 S.E.2d 535, 536 (1963) (recognizing that settlement agreements may be modified). *But cf.* Durham v. Gulf Interstate Eng'g Co., 74 N.M. 277, 393 P.2d 15, 18-19 (1964) (reopening of settlement denied where agreement by its terms expressly waives such right). Some courts have held that the statutory right to reopen settlements does not apply to compromise agreements. *See, e.g.*, Bliss v. Lungstras Dyeing & Cleaning Co., 130 S.W.2d 198, 200 (Mo. Ct. App. 1939) (compromise agreements not subject to review).

[27] 240 Miss. 204, 127 So. 2d 662 (1961).

[28] V. DUNN, *supra* note 24, § 339.

[29] 240 Miss. at 208, 127 So. 2d at 663.

[30] *Id.* at 208-09, 127 So. 2d at 664.

[31] The court stated that the facts of the case were not applicable to a reopening based on changed conditions or mistake. *Id.* at 209, 127 So. 2d at 664.

[32] 401 So. 2d 696 (Miss. 1981).

[33] *Id.* at 697. The claimant, a 38 year old truck driver, was unable to read or write except to sign his name. At the time of the injury, he was carrying a bundle of sheet rock up some stairs. *Id.*

[34] *Id.* The claimant's injury occurred on December 20, 1973, and he was first examined seven days later by Dr. Mitchell, who advised him to return to work on January 7, 1974. On February 7, 1974, Dr. Bishop examined the claimant and referred him to Dr. Buckley. Dr. Buckley and Dr. Bishop, both of whom listed claimant as totally disabled, performed surgery on the claimant's back on April 15, 1974. *Id.*

[35] *Id.* at 698. The carrier's claims adjuster recommended that the claimant see Dr. Smith in Jackson, Mississippi, although there were a number of equally capable doctors

latter physician also concluded that one-half of the claimant's disability might have preexisted the claimant's injury.[36] The claims adjuster offered the claimant a $6,500 settlement, based upon the 12½% disability rating given by the physician recommended by the carrier.[37] Following a meeting with the carrier's attorney, the claimant, without legal representation, accepted the settlement offer.[38] An administrative assistant from the Workmen's Compensation Commission subsequently interviewed the claimant and determined that the settlement based on the 12½% disability rating was in the claimant's best interest.[39] At no time during these meetings was the claimant advised of the previous disability rating given by his attending physicians.[40]

The Mississippi Supreme Court[41] allowed the section 9(i) compromise settlement to be reopened under section 21,[42] reasoning that since the claimant entered into the settlement agreement with knowledge only of the 12½% disability rating, and not of his attending physicians' diagnosis of total disability, the compromise agreement was not in his best interest.[43] The court further concluded that the agreement was a mistake in a determination of fact under section 21.[44]

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in the vicinity of the claimant's home. *Id.*

[36] *Id.* Dr. Smith rated the claimant's disability without receiving the records of the claimant's previous examinations. *Id.* at 697.

[37] *Id.* at 697. The claims adjuster testified that she considered the medical reports of Drs. Bishop and Buckley in determining the settlement offer, but could not recall if she provided copies of the reports to the claimant. *Id.*

[38] *Id.* at 698-99. The carrier's attorney testified that he explained the entire settlement petition to the claimant, that he informed the claimant of the finality of the agreement upon Commission approval, and that the claimant indicated that he understood these details before signing. *Id.*

[39] *Id.* at 699. An administrative assistant interviewed the claimant because the commissioners were out of town at the time of the claimant's visit. *Id.*

[40] *Id.* at 703.

[41] Justice Bowling authored the majority opinion, which was joined by Chief Justice Patterson and Justices Sugg, Lee, and Hawkins. *Id.* at 696, 708.

[42] *Id.* at 707.

[43] *Id.* at 707-08.

[44] *Id.* As a general rule, awards and settlements cannot be disturbed absent a showing of change in condition or fraud in the procurement. 3 A. LARSON, *supra* note 7, § 81.51; *see, e.g.*, ARK. STAT. ANN. § 81-1326 (1960) (allowing modification on the grounds of a change in condition or proof of erroneous wage rate), *construed in* Cook v. Brown, 246 Ark. 11, 436 S.W.2d 482, 484 (1969) (denied reopening of compromise lump sum settlement on grounds that claimant did not understand legal ramifications of agreement). A number of states have expanded the power of reopening through statutory provisions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-943 (1956) (upon presentation of new evidence); KY. REV. STAT. § 342-125 (1963) (fraud or error).

Mississippi has extended its modification provisions by expressly allowing reopening

In dissent, Justice Robertson,[45] argued that since the Workmen's Compensation Commission was the trier of fact, any finding by the Commission supported by substantial evidence should have been affirmed.[46] The dissenters asserted that the Commission's finding was supported by substantial evidence, noting that the testimony of the claimant was uncorroborated, and that it was refuted by four other witnesses.[47] In addition, the dissent pointed out that the claimant had failed to demonstrate that the settlement was procured by fraud or undue advantage on the part of the employer.[48]

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of an award or settlement in the event of a change in condition or mistake in determination of fact. MISS. CODE ANN. § 71-3-53 (1972). Other states with similar provisions have allowed settlements based solely on mistake to be reopened. *See, e.g.*, St. Pierre v. St. Regis Paper Co., 386 A.2d 714, 720 (Me. 1978) (agreement modified based on a mistake of fact by the employee); Twin City Fire Ins. Co. v. Foster, 537 S.W.2d 760, 763 (Tex. Civ. App. 1976) (review and modification of award permitted when accepted as result of a mistake of fact).

The ability to modify settlements on the basis of mistake is subject to reasonable limitations. *See, e.g.*, International Metal Prods. v. Industrial Comm'n, 6 Ariz. App. 543, 434 P.2d 659, 660 (1967) (mistake warranting reopening is ordinarily a mistake by the fact-finder); Sander v. Coast Cities Coaches, Inc., 156 So. 2d 162, 164 (Fla. 1963) (modification denied where mistake of fact made by claimant's witnesses); Beaty v. M. & S. Maintenance Co., 124 So. 2d 868, 869 (Fla. 1960) (must be a mistake relating to a material fact); Galacie v. Texas Employers' Ins. Ass'n, 348 S.W.2d 417, 420 (Tex. Civ. App. 1961) (reopening on grounds of mistake applicable only if mistake leads to the entry of an erroneous award, not to matters that occur after award is made).

[45] Justices Smith, Walker, and Broom joined in the dissent. 401 So. 2d at 708.

[46] *Id.* at 715. Justice Robertson cited Roberts v. Junior Food Mart, 308 So. 2d 223 (Miss. 1975), and Shippers Express v. Chapman, 364 So. 2d 1097 (Miss. 1978), to support his argument that the Commission's findings should be affirmed. Both cases held that a finding of the Commission should not be overturned where the finding is supported by substantial evidence. 401 So. 2d at 715-16.

[47] 401 So. 2d at 715-16.

[48] *Id.* The dissent cited Cook v. Brown, 246 Ark. 11, 436 S.W.2d 482 (1969), in support of the proposition that compromise settlements may not be reopened absent a showing of fraud or undue influence. In *Cook*, the claimant's request to have the settlement reopened on the ground that he did not understand its ramifications was denied. *Cook* is distinguishable from *Bailey Lumber* since the pertinent Arkansas statute does not allow reopening on the basis of mistake. *See* ARK. STAT. ANN. § 81-1326 (1960) (allowing modification only on grounds of a change in condition or proof of erroneous wage rate). Since the claimant in *Cook* did not fall within one of the express conditions necessary for reopening, his only alternative was to prove fraud or undue influence in the procurement of the settlement. Absent such a showing, his claim was denied. 436 S.W.2d at 483-85.

In *Bailey Lumber*, the claimant was not seeking reopening on the basis of his failure to understand the finality of the decision, although he did claim that the settlement was not properly explained to him. Rather, the claimant sought reopening on the basis of mistake, which is expressly allowed by statute in Mississippi. MISS. CODE ANN. § 71-3-53

Bailey Lumber is significant because it allowed the reopening of a section 9(i) compromise settlement without requiring the claimant to prove fraud or undue advantage, which was a necessity in previous cases.[49] In reaching this result, the majority emphasized the unusual facts in the case; primarily, the withholding of two of the claimant's medical reports from his file, his not being represented by an attorney, and his being interviewed by an administrative assistant rather than a member of the Commission.[50] Thus, the peculiar facts of the case limits its value as precedent. Its significance lies in the pronouncement of the court's new position regarding reopening section 9(i) compromise settlements. The court indicated that it will review the facts of each case and allow reopening on the basis of mistake if the settlement was not made in the best interest of the claimant.

The implications of the court's decision in *Bailey Lumber* are far reaching.[51] If the holding is taken to its extreme, a compromise settlement[52] could be reopened for virtually any injustice to the claimant. In order to protect the stability of compromise settlements, the court should in future cases focus its holding in *Bailey Lumber* to the requisite presentation of all material facts to the claimant.

B. Retaliatory Discharge

An employment contract for an indefinite period of time generally may be terminated at the will of either party.[53] Mississippi courts have

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(1972). Thus, the *Bailey Lumber* holding is distinguishable from *Cook* since the claimant was seeking reopening on a basis expressly allowed by statute.

[49] One commentator, in a work on workmen's compensation in Mississippi, stated:

> The difference in character of an approved compromise settlement, as distinguished from a commuted lump sum payment, has been emphasized and it has been intimated, although not expressly decided, that the compromise settlement may not be reviewed or vacated, at least in the absence of a showing of fraud upon or the taking of an unfair advantage of the claimant in connection therewith.

V. DUNN, *supra* note 24, § 339.

[50] *See supra* notes 32 through 39 and accompanying text.

[51] The court's holding will probably force the Commission to take additional procedures to insure that each settlement agreement is in the claimant's best interest.

[52] The court indicated that no distinction existed between the two types of settlements concerning reopening. 401 So. 2d at 704. Therefore, the implications of the decision would also seem to apply to lump sum settlements.

[53] 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 183 (2d ed. 1913). The well-established terminable at will rule, which permits an employer to dismiss an employee for any reason at any time when the employment is of unspecified duration, originated as a presumption to be applied when interpreting employment contracts that did not provide for a term of employment. *See generally,* Feinman, *The Development of*

adhered to this common law rule,[54] allowing employers to discharge employees without justification. The terminable at will rule has been criticized[55] as violative of public policy when discharges are made in bad faith or in retaliation.[56] The harsh application of the rule has been remedied in many instances by federal statute.[57] State legislatures have

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the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118, 122 (1976).

The terminable at will rule has been strictly adhered to by American courts and was elevated to a constitutionally protected right in two early twentieth century United States Supreme Court cases. *See* Coppage v. Kansas, 236 U.S. 1, 26 (1915) (state legislation prohibiting discriminatory firing of employees for union activities held unconstitutional); Adair v. United States, 208 U.S. 161, 174 (1908) (invalidating federal statute similar to the state legislation later invalidated in *Coppage*); *accord* Coffeyville Vitrified Brick & Tile Co. v. Perry, 69 Kan. 297, 76 P. 848, 850 (1904) (recognizing employer's absolute right of discharge under interpretation of state constitution); St. Louis S.W. Ry. v. Griffin, 106 Tex. 477, 171 S.W. 703, 707 (1914) (same).

These decisions were undermined by NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937), in which the United States Supreme Court expressly upheld legislation protecting employees' right to unionize free of intimidation and coercion by employers. Since *Jones & Laughlin*, statutes restricting an employer's right to discharge an employee have been enacted based on various policy reasons. *See infra* notes 57 and 58.

[54] *See, e.g.*, Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 61, 25 So. 2d 572, 576 (1946) (recognizing that a contract of employment for indefinite period of time may be terminable at the will of either party); Rape v. Mobile & O.R.R., 136 Miss. 38, 49, 100 So. 585, 588 (1924) (same); Butler v. Smith, 35 Miss. 457, 464 (1858) (same).

[55] *See, e.g.*, Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06 (1967) (terminable at will rule renders employee vulnerable to whims of employer); Blumberg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry*, 24 OKLA. L. REV. 279, 280 (1971) (recognizing trend of policy exceptions to terminable at will rule); Note, *A Common Law Tort Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1443-46 (1975) (modern employer-employee relationship demands restrictions on employer's dismissal power); Comment, *Contracts — Termination of Employment at Will — Public Policy May Modify Employer's Right to Discharge*, 14 RUTGERS L. REV. 624, 626 (1960) (discussing employee's remedies for wrongful discharge); 4 TEX. TECH L. REV. 387, 388-90 (1971) (discussing need for new remedy for wrongfully discharged employees).

[56] Several courts have adopted a public policy exception to the terminable at will rule in the absence of legislation providing that employment contracts may not be terminated for reasons contrary to express public policy. *See, e.g.*, Petermann v. International Bhd. of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25, 27 (1959) (employment discharge for refusal to perjure contrary to public policy); Nees v. Hocks, 272 Or. 210, 536 P.2d 512, 515 (1975) (employment discharge for serving jury duty contrary to public policy).

[57] Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (establishing penalty for discharge of employees due to garnishment of wages); National Labor Relations Act, 29 U.S.C. §§ 151-166 (1976 & Supp. 1978) (unlawful to discharge employee for union activities); Age Discrimination in Employment Act of 1967, *id.* § 623 (1976) (regarding power of discharge of aged); Occupational Safety and Health Act, *id.* § 660(c) (1976)

adopted statutes that create a public policy exception to the terminable at will rule and impose sanctions against an employer who uses the rule in retaliation against an employee pursuing his rights under a workmen's compensation act.[58] In the absence of such a statue, courts have denied the injured employee recovery in tort based upon a theory of retaliatory discharge.[59]

In 1981, the Mississippi Supreme Court addressed this problem for the first time[60] and held that an injured employee has no legal rights when fired for pursuing workmen's compensation benefits. In *Kelly v. Mississippi Valley Gas Co.*,[61] an injured employee alleged that his employment was terminated because he failed to dismiss his workmen's compensation claim and sought to recover actual and punitive damages from his employer based on retaliatory discharge.[62] Recognizing the need to exercise judicial restraint and to limit its role to applying the law as enacted by the legislature,[63] the court refused to adopt a

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(prohibits retaliation against employees for initiating proceedings); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976) (prohibiting discharge based on race, color, religion, national origin or sex).

[58] *See, e.g.*, ILL. REV. STAT. ch. 48, § 138.1 (Supp. 1981) (imposes sanctions against employer for discharging employee for pursuing workmen's compensation rights); MICH. COMP. LAWS § 418.125 (Supp. 1981) (same); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1981) (same); OR. REV. STAT. § 659.410 (1979) (same).

[59] *See, e.g.*, Martin v. Tapely, 360 So. 2d 708, 709 (Ala. 1978) (refusing to adopt a public policy exception to the terminable at will doctrine for a retaliatory discharge for pursuing workmen's compensation benefits); Seagel v. Arrow Indus. Corp., 364 So. 2d 89, 90 (Fla. Dist. Ct. App. 1978) (same); Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510, 511 (La. Ct. App. 1974) (same); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272, 276 (1978) (same); Raley v. Darling Shop of Greenville, Inc., 78 S.C. 445, 59 S.E.2d 148, 149 (1950) (no cause of action stated in complaint for retaliatory discharge); *cf.* Narens v. Campbell Sixty-Six Express, Inc., 347 S.W.2d 204, 205 (Mo. 1961) (although statute prohibited discharging employee for pursuing workmen's compensation benefits, no indication of legislative intent to create new civil cause of action).

[60] In Green v. Amerada-Hess Corp., 612 F.2d 212 (5th Cir. 1980), the Fifth Circuit Court of Appeals considered the question under existing Mississippi law and held that the employer's motion for summary judgment was properly granted since the employer had a legal right to terminate the employee's employment contract at will. *Id.* at 214. The court added that since neither the Mississippi Supreme Court nor the Mississippi Legislature had created or provided for a cause of action for such retaliatory discharge, the federal court could not create such a remedy. *Id.* at 214-15.

[61] 397 So. 2d 874 (Miss. 1981).

[62] *Id.* at 874.

[63] *Id.* at 877. The Mississippi Workmen's Compensation Act provides no remedy for retaliatory discharge but does state that "[t]he liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee." MISS. CODE ANN. § 71-3-9 (1972).

Because of the barriers created by the Act, the employee in *Kelly* sought to recover

public policy exception to the terminable at will rule by creating a private right of action against the employer.[64] Since the Mississippi Workmen's Compensation Law did not expressly provide such a remedy,[65] the court concluded that such a public policy decision was better left to the legislature.[66]

The Mississippi Supreme Court's failure to adopt a public policy exception and to hold the employer liable in a common law tort action is consistent with the holdings of other jurisdictions.[67] The purpose of the Mississippi Workmen's Compensation Act—to provide compensation to injured workers—is undermined, however, by not redressing retaliatory discharges. In the absence of a public policy exception, employers are able to avoid their duty to compensate employees for work-

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under a cause of action in tort for retaliatory discharge that was separate and distinct from his claim under the Act.

[64] 397 So. 2d at 877.

[65] *Id.* at 876.

[66] 397 So. 2d at 877. While deferring to the legislature, the court recommended a statute that would achieve the necessary result. The court noted that when the Texas Legislature addressed this problem it amended the Texas Workmen's Compensation Law to include a statute setting forth a civil remedy for retaliatory discharges. *Id.* at 877 n.2.

The Texas statute provides:

> Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.
>
> Sec. 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.
>
> Sec. 3. The district courts of the State of Texas shall have jurisdiction, for cause shown, to restrain violations of this Act.

TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Supp. 1981); *accord* CAL. LAB. CODE § 132a (West Supp. 1981) (workmen's compensation legislation dealing with retaliatory discharges); HAWAII REV. STAT. § 378-32 (1976) (same); MD. ANN. CODE art. 101, § 39A (1979) (same); N.J. STAT. ANN. § 34.15-39-1 (West Supp. 1980) (same); N.Y. WORK. COMP. § 120 (McKinney Supp. 1981) (same); N.C. GEN. STAT. § 97-6.1(a) (1979) (same); OKLA. STAT. ANN. tit. 85, § 5 (West Supp. 1981) (same); W. VA. CODE § 23-5A-1 (1981) (same); WIS. STAT. ANN. § 102.35 (West Supp. 1981) (same).

[67] *See supra* note 59. While the court's holding makes it clear that no cause of action exists in tort for wrongful discharge, the decision makes no mention of possible recovery for breach of contract. *Cf.* Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549, 551 (1974) (wrongful discharge motivated by bad faith, malice, or retaliation constitutes a breach of contract). *See generally* 7 CONN. L. REV. 758, 771-73 (1975); 43 FORDHAM L. REV. 300, 309-10 (1974); 8 GA. L. REV. 996, 1003-05 (1974).

related injuries. Conversely, the terminable at will rule nullifies the employee's right to pursue such compensation. In order to realize the Act's goals, the employee must be able to pursue his right of compensation without fear of reprisal. In light of the court's pronouncement in *Kelly,* the legislature must now act if such protection is to be afforded the employee. Since the public policy considerations of protecting the claimant's right to pursue workmen's compensation benefits clearly justify the adoption of such a statute, it is urged that the legislature enact statutes to prevent retaliatory discharges from going unremedied.

C. Assaults

Recovery under the Mississippi Workmen's Compensation Act requires a showing by the claimant that the injury sustained resulted from an accident "arising out of and in the course of employment."[68] Although an assault is intentional by nature, Mississippi, like most other jurisdictions, has expressly included assaults under the statutory definition of accidents.[69] The assault-related cases normally have been divided between assaults by co-employees[70] and assaults committed by

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[68] MISS. CODE ANN. § 71-3-7 (1972) provides in part: "Compensation shall be payable for disability or death of an employee from injury or occupational disease arising out of and in the course of employment . . . . "

The Mississippi Supreme Court has interpreted the "arising out of and in the course of" language as a two-pronged test. Under this approach, an injury arises out of employment when a causal connection exists between the injury and the employment. Earnest v. Interstate Life & Accident Ins. Co., 238 Miss. 648, 652, 119 So. 2d 782, 783 (1960); Brookhaven Steam Laundry v. Watts, 214 Miss. 569, 600, 55 So. 2d 381, 391 (1951). The additional requirement that the injury be in the course of employment is satisfied only when the injury occurs within the time and space limitations of the employment. Persons v. Stokes, 222 Miss. 479, 486, 76 So. 2d 517, 519 (1954).

The Mississippi Supreme Court has apparently abandoned this traditional approach in favor of a unitary test. In Mississippi Research & Dev. Center v. Shults, 287 So. 2d 273 (Miss. 1974), an employee who suffered from a pre-existing heart disease, which was aggravated by his job, died in his house one evening after work. The court seemed to abandon the time and space limitations by stating that the phrase "arising out of and in the course of employment" "does not say that the injury must 'occur' or 'be manifested' or 'be consummated' in the course of employment. It merely says that it must arise ' . . . in the course of employment.' 'Arising' connotes origin, not completion or manifestation." *Id.* at 276 (quoting 1 A. LARSON, *supra* note 7, § 22.22). In light of the language in *Shults,* the test now seems to be one of direct causal connection between employment and the injury. *But cf.* MISS. CODE ANN. § 71-3-3(b) (Supp. 1981) (third-party assaults compensable only when employee is attacked while on the job).

[69] MISS. CODE ANN. § 71-3-3(b) (Supp. 1981).

[70] *See infra* notes 73-75 and accompanying text.

third parties.[71] The distinction arising from the statutory formula provides that assaults by third parties must be directed against an employee because of his employment in order for the assault to be compensable.[72] Such proof is not required in the co-employee assault scenario.[73] In either case, if the injured employee is assaulted because of some personal reason that is wholly disconnected from the employment, the injury is noncompensable.[74] Since an assault by a co-employee requires no proof that the attack was motivated because of the employment, the Mississippi Supreme Court has used various theories to compensate injuries caused by co-employee assaults.[75] The additional burden of proving that an assault by a third party was directed toward the employee because of the employment has created a more difficult analysis.[76]

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[71] *See infra* notes 72, 76 and accompanying text.

[72] MISS. CODE ANN. § 71-3-3(b) (Supp. 1981) provides in part: "'[I]njury' means accidental injury or accidental death arising out of and in the course of employment, and includes . . . an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job . . . ."

[73] *See* Mutual Implement & Hardware Ins. Co. v. Pittman, 214 Miss. 823, 828, 59 So. 547, 551 (1952) (assault committed by co-employee requires no proof that assault occurred because of employment).

[74] When the animosity that instigates the assault originates in the injured employee's private life, the injury does not arise out of the employment. *See, e.g.*, Dewberry v. Carter, 218 So. 2d 27, 30 (Miss. 1969) (death benefits denied when decedent's death caused by personal dispute unrelated to employment); Ellis v. Rose Oil Co., 190 So. 2d 450, 450 (Miss. 1966) (same). *See generally* 1 A. LARSON, *supra* note 7, § 11.21.

If the motive for the assault is substantially related to the employment, some jurisdictions award compensation despite the fact that personal animosity contributed to the occurrence. *See, e.g.*, Brewster Motor Co. v. Industrial Comm., 36 Ill. 2d 443, 223 N.E.2d 131, 134 (1967) (buyer instructed salesman to deliver vehicle to his residence and then killed salesman because of an alleged affair with wife); Keyhea v. Woodward-Walker Lumber Co., 147 So. 830, 832-33 (La. Ct. App. 1933) (where two workers and families resided in employer's mill quarters and were in daily association, fatal assault on worker because of attention paid to other worker's wife compensable); Crowder v. State Compensation Comm., 115 W. Va. 12, 174 S.E. 480, 481-82 (1934) (service station attendant who continually left station restroom door open was assaulted by next door neighbor who was incensed at violation of his privacy).

[75] *See, e.g.*, Watson v. National Burial Ass'n, 234 Miss. 749, 757, 107 So. 2d 739, 743 (1958) (compensation allowed under proximity theory when decedent killed by co-employee for no known reason); Mutual Implement & Hardware Ins. Co. v. Pittman, 214 Miss. 823, 828, 59 So. 2d 547, 551 (1952) (compensation allowed under industrial contact theory).

[76] In Barry v. Sanders Co., 211 Miss. 656, 52 So. 2d 493 (1951), the Mississippi Supreme Court held that the issue of whether the claimant was assaulted because of his employment is a question of fact to be decided by the Workmen's Compensation Commission. *Id.* at 661, 52 So. 2d at 495. The court has compensated employees when the

In 1981, the Mississippi Supreme Court confronted the issue of whether injuries suffered as the result of an assault by an employer are compensable. In *Kerr-McGee Corp. v. Hutts*,[77] a service station attendant was shot and killed by his employer in the service station parking lot.[78] The incident occurred in the employer's vehicle after the em-

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animosity leading to the assault was created by the job environment. *E.g.*, John Hancock Trucking Co. v. Walker, 243 Miss. 487, 494, 138 So. 2d 478, 480 (1962) (injury compensated when argument over work duties caused assault by fellow employee). The court's first encounter with a third party assault caused by personal animosity led to temporary confusion. In Brookhaven Steam Laundry v. Watts, 214 Miss. 578, 55 So. 2d 381, *rev'd on rehearing*, 214 Miss. 626, 59 So. 2d 294 (1951), a delivery man was killed by the irate husband of a woman with whom he was having an affair. 214 Miss. at 585, 55 So. 2d at 384. As a delivery man, the employee was required to pick up and deliver laundry from various residences. He became involved in an affair with one of his customers. On the day of his death, the delivery man went to the residence of his lover to meet with her and, while there, was shot and killed by his lover's husband. *Id.* at 585, 55 So. 2d at 384. The court originally compensated the delivery man's death through an application of the positional-risk doctrine. *Id.* at 597-98, 55 So. 2d at 390. The opinion was criticized as an improper application of the positional-risk doctrine since the doctrine only applies when the risk is neutral; the assault in *Watts* was purely personal. 1 A. LARSON, *supra* note 7, § 11.21. On rehearing, the decision was reversed on the grounds that the employee's death had arisen because of personal reasons unrelated to his employment. 214 Miss. at 640, 59 So. 2d at 302. The court held that the mere fact that the employment brought the employee to the place he was injured was insufficient to establish a causal connection between the injury and employment when the assailant's animosity toward the employee was purely personal. *Id.* at 640, 59 So. 2d 302. The *Brookhaven* decision has been followed in subsequent third party assault cases in which the animosity was of a personal nature. *See, e.g.*, Ellis v. Rose Oil Co., 190 So. 2d 450, 450 (Miss. 1966) (compensation denied where proof clearly showed that injury arose out of claimant's personal activities); West's Estate v. Southern Bell Tel. & Tel. Co., 288 Miss. 890, 895, 90 So. 2d 1, 4 (1956) (no causal connection between injury and employment when animosity personal to employee).

Recently, in Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888 (Miss. 1980), the court confronted the issue of whether an injury caused by a third party should be compensated when the assault was neither work-related nor personal. *Id.* at 891. The case involved a route salesman who stopped to help an apparently disabled motorist who struck the salesman and injured him. *Id.* at 892. The court held the injury to be compensable since the causal connection between the injury and the employment sufficiently satisfied the statutory requirement that the injury occur "because of" employment. *Id.* at 891-92. An injury occurs in the course of employment when the employer can reasonably foresee that the employee will deviate from his travel to aid a distressed motorist. *Id.*

[77] 401 So. 2d 1277 (Miss. 1981).

[78] *Id.* The claimant, Cecil Hutto, was the father of the decedent, Tommy Hutto. While employed by Peoples' Service Station, young Hutto was engaged in an affair with the store manager, Mrs. Robert Glenn Scruggs. The assailant, Robert Glenn Scruggs, was the manager of another Peoples' Service Station, and also in charge of the station that his wife managed. Mr. Scruggs hired Hutto. *Id.* at 1277-79.

ployer had summoned the employee.[79] The animosity between the two men was apparently created by the employee's intimate relationship with the employer's wife.[80] At trial, the employer testified that the incident had no relation to the employee's work at the service station and that he shot the employee in self defense.[81]

The supreme court[82] upheld the lower court's award of workmen's compensation benefits since the fatal injury caused by the employer's assault occurred on the premises of employment and while the employee acted under a directive of his employer.[83] The court distinguished previous assault decisions involving co-employees[84] and third parties[85] on the basis of the special relationship that exists between employees and their superiors.[86] The court concluded that any personal motivation for the assault was immaterial because the employee was acting within the scope of his employment since, at the time of the injury, the employee acted under his superior's directive.[87]

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[79] *Id.* at 1278. Scruggs and his wife were separated. On the day of the altercation, Scruggs had gone to the decedent's place of employment to talk with his wife about a possible reconciliation. Scruggs was unsuccessful in talks with his wife and requested that Hutto be sent out to talk with him. Mrs. Scruggs summoned Hutto from a back room, where he had been putting up stock, and told him to go speak with Scruggs. Hutto did so and was subsequently shot. *Id.*

[80] *Id.* at 1277.

[81] *Id.* at 1278. Scruggs testified that he shot Hutto only after Hutto had pulled a knife on him. *Id.*

[82] Chief Justice Patterson wrote the majority opinion and was joined by Justices Sugg, Lee, Bowling, and Hawkins. *Id.* at 1277, 1282. Justice Walker dissented and was joined by Justices Smith, Robertson, and Broom. *Id.* at 1282.

[83] *Id.* at 1281. The court emphasized that the decedent was ordered to the site of the assault by the superior's directive by stating that "the employee's death was so strongly connected to the directive of his superior that it cannot be completely disassociated from his employment." *Id.*

[84] *See supra* note 75 and accompanying text.

[85] *See supra* note 76 and accompanying text.

[86] 401 So. 2d at 1281-82. The court distinguished *Hutto* from co-employee cases on the basis that the injury was not caused by a co-employee but rather by a superior. The court recognized that *Hutto* was analogous to earlier Mississippi decisions dealing with third party assaults but reasoned that these cases were inapplicable since the injuries or deaths were not caused by a fellow employee or employer. *Id.*

[87] *Id.* at 1281. The court determined that the directive leading to the assault was strong enough to counter any private motivation or other factor that might remove the death from the scope of Mississippi's Workmen's Compensation Law. *Id.*

The fact that the elder Hutto died some time after bringing his claim forced the court to address the issue of whether the benefits accrued, but not yet paid prior to the claimant's death, would become an asset of his estate. The court initially determined that it had not lost jurisdiction over the case because the elder Hutto had died after the decision of the Commission and before the circuit court's affirmance. The court con-

The dissenting justices argued that the injury was the result of a personal conflict caused by the intimate relationship between the employee and the employer's wife, and that the employee's employment was unrelated to the cause of his death except to afford the couple the opportunity to meet.[88] The dissent reasoned that to compensate injuries arising from a purely personal conflict went beyond the legislative intent of compensating only those injuries arising "out of and in the course of employment."[89]

The court's holding in *Kerr-McGee* is significant because of the length the court went to compensate the injury and because it is the only case in Mississippi to compensate an injury where there was evidence of personal animosity created outside the job environment.[90] The court disregarded contrary authority and found causation by emphasizing that the employee acted under the directive of his superior.[91] The reasoning of the court apparently dealt with the employee's state of mind at the time he was summoned by his employer.[92] The court

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cluded that the claimant's heirs "stepped into his shoes" and were entitled to any benefits he might have received. *Id.* at 1280. In reaching this conclusion, the court relied on Burton v. Redmond, 211 Miss. 158, 165, 51 So. 2d 210, 212 (1951), *rev'd on other grounds*, 220 Miss. 707, 71 So. 2d 772 (1954), which held that in an ejectment action, when one of the parties died between the time of the county court's decision and the circuit court's decision on appeal, those who stepped into the shoes of the deceased party were "entitled to the rights inuring to his benefit." 401 So. 2d at 1280 (quoting Burton, 211 Miss. at 165, 51 So. 2d at 212.)

The court distinguished *Hutto* from Owen v. Abraham, 233 Miss. 558, 102 So. 2d 372 (1958), in which the court dismissed the appeal of a divorce action for lack of jurisdiction because the appellee had died prior to the final decree of the lower court. 401 So. 2d at 1280. The court first noted that in *Owen* the party died prior to a decision by the original trier of fact, whereas the claimant in *Hutto* died during the appeal and review process. *Id.* Secondly, the court noted that *Owen* involved a divorce proceeding and the application of the general rule that the death of a party to a divorce action cancels the bill of complaint for divorce because the marriage is ended by the death. *Id.*

[88] *Id.* at 1282 (Walker, J., dissenting).

[89] *Id.* Justice Walker stated that "[i]t seems significant to me that no case from this or any other state is cited as allowing recovery of benefits under similar circumstances." *Id.*

[90] *See supra* note 76 and accompanying text.

[91] *See supra* note 83 and accompanying text.

[92] The court quoted the administrative judge:

> While both Mr. and Mrs. Scruggs were aware that Mr. Scruggs' mission was entirely personal, there is no showing as to Mr. Hutto's knowledge, or his understanding with respect to same. The only evidence we have in this regard is that Tommy Hutto, an employee, was requested by his superior, Mrs. Scruggs, to talk to another superior, Mr. Scruggs. We know the state of mind of the Scruggs from the testimony herein. We do not know the state of mind of Tommy Hutto. The evidence on its face establishes a clear business purpose

appeared to accept the finding of the administrative judge that the claimant should not be denied benefits where it is reasonable to conclude that the employee acted pursuant to his employer's instructions.[93] The administrative judge reasoned that although the conversation later became personal, it did not take the employee out of his employment because the employee obeyed a directive of the employer and thought he was being summoned to talk to the employer on business-related matters.[94] The court's rationale with regard to an employee responding to his employer's directive represents a fair and equitable rule, but such reasoning should not be used to compensate the fatal injury in *Kerr-McGee*. While no evidence existed that indicated the employee's awareness that his superior wanted to see him for personal reasons, neither was there evidence to the contrary.[95] In the absence of such evidence, the court should have considered the circumstances surrounding the assault, which would leave little doubt that the employee was fully aware that the ensuing conversation with his employer was of a personal nature, and for this reason compensation should have been denied.

II. Disciplinary Proceeding for Attorney Misconduct

The inherent power of the judiciary to discipline attorneys for violating prescribed standards of professional conduct[96] is recognized by

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> for Mr. Hutto being where he was at the time he was shot, and while an award of benefits cannot be made on mere surmise, speculation and conjecture, we are dealing with the state of mind of an individual whose voice is forever stilled.

401 So. 2d at 1278.

[93] *Id.* at 1278-79.

[94] *Id.* at 1279.

[95] The decision by the Mississippi Workmen's Compensation Commission illustrates this lack of evidence. A majority of the Commission compensated the injury since there was no evidence indicating that Hutto "was aware of the fact that he and his superiors were engaged in anything other than the official acts of giving and receiving orders." The chairman of the Commission dissented since uncontradicted evidence demonstrated that Mr. Scruggs shot Hutto for purely personal reasons. *Id.* at 1278-79.

[96] Historically, the power to admit, control, and discipline attorneys has been vested in the courts. The basis of this power was explained by the Illinois Supreme Court:

> In 1292, Edward I made an order by which he appointed the lord chief justice of the court of common pleas and the rest of his fellow justices of that court, that they, according to their discretion, should provide and ordain from every county certain attorneys and apprentices of the best and most apt for their learning and skill, who might do service to his court and people, and those so chosen only, and no other, should follow his court and transact the affairs thereof . . . . The profession of attorney was placed under control of the

all states.[97] The purpose of the judiciary's disciplinary power over attorneys is not to punish the attorney, but is to protect the public and the administration of justice from attorneys who are unable to discharge properly their professional duties and responsibilities.[98]

Although disciplinary proceedings are not criminal in nature,[99] they possess punitive characteristics. In recognition of the punitive aspects of disciplinary proceedings the United States Supreme Court in *In re Ruffalo*[100] held that the traditional notions of due process, including notice and hearing, must nevertheless be accorded an attorney.[101]

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judges, and the discretion to examine applicants as to their learning and qualifications, and to admit to practice, was exercised from that day by the judicial department of the English government . . . .

In re Day, 181 Ill. 73, 54 N.E. 646, 649 (1899). *See generally* Note, *Disbarment Procedure*, 47 IOWA L. REV. 984, 985-92 (1962).

[97] Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 707 n.4 (1981); *see In re* Higgins, 194 Miss. 838, 844, 13 So. 2d 829, 831 (1943) (superior courts of the state have inherent power derived from their constitutional basis to discipline members of the bar for misconduct).

[98] *See In re* Ruffalo, 390 U.S. 544, 550-51 (1968) (disbarment designed to protect public); *Ex parte* Wall, 107 U.S. 265, 288 (1882) (disciplinary proceedings exist for purpose of preserving the courts from attorneys unfit to practice).

The Seventh Circuit Court of Appeals aptly described the true purpose of such proceedings:

> [Disciplinary] proceedings are not lawsuits between parties litigant but rather are in the nature of an inquest or inquiry as to the conduct of the respondent. They are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and the attorney's right to continue to practice a profession imbued with public trust.

In re Echeles, 430 F.2d 347, 349-50 (7th Cir. 1970) (citations omitted).

[99] The United States Supreme Court, in *In re* Ruffalo, 390 U.S. 544, 551 (1968), stated that such proceedings are of a quasi-criminal nature. The classification appears to have been accepted by the Mississippi Supreme Court. *See* Mississippi State Bar v. Attorney-Respondent, 367 So. 2d 179, 185 (Miss. 1979) (recognizing that disciplinary proceedings, although not primarily criminal in nature, do have penal elements). *See generally* Comment, *Disbarment in the United States: Who Shall Do the Nuisance Work?*, 12 COLUM. J.L. & SOC. PROBS. 1, 18-22 (1975).

[100] 390 U.S. 544 (1968).

[101] *Id.* at 550; *see also* Spevack v. Klein, 385 U.S. 511, 515 (1967) (recognizing that punitive nature of disbarment proceedings demand due process protection). The Mississippi Supreme Court in discussing these decisions stated:

> [N]either *Spevack* nor *In re Ruffalo* held that a disciplinary hearing is the equivalent of a criminal trial. Both, however, recognized that due to the severity of possible punishment due process demands that the proceedings be conducted with regard to the attorney's rights of notice and opportunity to be

The United States Supreme Court has not delineated the exact extent to which the requirements of notice and hearing apply.[102] As a result, discordant standards now exist among the varying jurisdictions,[103] with several courts averting the directive for all practical purposes by providing only minimal due process.[104]

By virtue of their inherent powers, courts conceivably could manufacture their own procedure for attorney disciplinary proceedings. In an attempt to achieve a uniform and orderly procedure, courts have allowed various forms of written rules governing such proceedings to be adopted or enacted.[105] These rules are neither restrictive of the courts' inherent power nor exclusive;[106] they merely prescribe a preferential

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heard.

Mississippi State Bar v. Attorney-Respondent, 367 So. 2d 179, 185 (Miss. 1979).

For a general discussion of the historical development of due process in attorney disciplinary proceedings, see Comment, *supra* note 99, at 22-25.

[102] The Court has implied that in some circumstances the level of due process may be minimal. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512-13 (1874) (while cases of gross and outrageous conduct justify very summary proceedings for suspicion and disbarment, the attorney still retains the opportunity to be heard before being disbarred); *see also* Note, *supra* note 96, at 990-91 (lower standard of due process based on premise that disciplinary proceedings are not an "action," but a form of judicial housecleaning; resemblence between disbarment and other proceedings coincidental).

[103] *See* Comment, *supra* note 99, at 24-25 (application of *Ruffalo* directive by lower courts has led to varying standards).

[104] *See In re* Chipley, 448 F.2d 1234, 1235 (4th Cir. 1971) (an attorney given adequate notice of charges and afforded an opportunity to respond, procedural due process satisfied although not given a hearing); Barnes v. Lyons, 187 F. 881, 883 (9th Cir. 1911) (notice requirement satisfied if attorney informed of charges against him).

[105] *See* Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, 65 IOWA L. REV. 1386, 1386 (1980) (most jurisdictions have adopted written guidelines in the form of statutes, judicial orders, or a combination of judicial and legislative means).

[106] Courts will allow the legislature to enact regulations in aid of the court's disciplinary power as a matter of convenience, but the ultimate power of admission and disbarment remains vested in the judiciary. *See* Steele, *Cleaning Up the Legal Profession: The Power to Discipline — The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413, 416-19 (1978) (discussing relationship between judicial and legislative branches regarding power to discipline lawyers). While the courts have deferred to such legislation, they continue to guard jealously their power to discipline, striking down any legislation that encroaches upon their privilege. *See, e.g., In re* Opinion of the Justices, 279 Mass. 607, 180 N.E. 725, 727-28 (1932) (invalidating legislative effort to direct manner of exercising judicial power); State v. Cannon, 206 Wis. 374, 240 N.W. 441, 450-51 (1932) (invalidating legislative mandate that directed the reinstatment of disbarred attorney). Despite this jealous protection, the courts were not, historically, very aggressive in enforcing their inherent power. As a result, low professional standards and wide-spread corruption existed. By 1945, state bar organizations began taking a more active role in enforcing disciplinary rules. *See* Steele, *supra*, at 9-17 (discussing efforts by bar to police itself). Legislative enactments, such as MISS. CODE ANN. §§ 73-3-301 to -345 (Supp. 1981), were passed that

method of procedure that the court may, as a matter of discretion, require to be followed.[107]

Sections 73-3-301 through 73-3-345 of the Mississippi Code[108] encompass the uniform attorney disciplinary proceedings of this state. This statutory scheme provides for the appointment of a complaint counsel who investigates the various complaints against members of the state bar.[109] In the event of a complaint, the accused attorney is to be notified of such investigation, provided with a general statement of the charges, furnished with a copy of the complaint plus any evidence in support of it, and afforded a hearing before the complaint counsel.[110] The accused attorney has no right to be present, either in person or through representation, at any stage of the hearing except to make a verbal or written statement admitting or denying the alleged misconduct.[111] If the committee on complaints finds, based upon a review of the record, the complaint counsel's report, and any written response by the accused attorney, reasonable grounds to believe that the accused

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conferred broad powers on state bar organizations to scrutinize the profession. *But see* Glaser, THE ORGANIZATION OF THE INTEGRATED BAR, *reprinted in* THE LAWYER IN MODERN SOCIETY 386, 386-91 (V. Countryman, T. Finman & T. Schneyer eds. 1976) (state bar actions subject to supreme court approval). These powers include authorization to receive and investigate complaints, conduct hearings, and take disciplinary actions against unfit attorneys. *See generally* Martyn, *supra* note 97, at 706-22. Objections to the exercise of disciplinary power by the various state bar organizations have been refuted by recognizing that their participation is more a service to the court than a usurpation of the court's inherent power. Steele, *supra*, at 416-25.

[107] *See In re* Higgins, 194 Miss. 838, 845, 13 So. 2d 829, 832 (1943) (recognizing that statutes regulating the bar and providing for procedures against members for misconduct merely prescribe uniform method subject to courts' approval).

[108] MISS. CODE ANN. §§ 73-3-301 to -345 (Supp. 1981).

[109] *Id.* § 73-3-305(a). The complaint counsel is required to be a member of the state bar and may serve either full or part time. *Id.*

[110] *Id.* § 73-3-313. This investigatory hearing is not intended to be a full evidentiary hearing on the merits. *Id.* § 73-3-315(c). Additionally, the Mississippi Supreme Court has held that an accused attorney cannot be compelled to testify at such a hearing, nor can he be compelled to respond to a subpoena duces tecum before the complaints committee has filed a formal complaint against him. Mississippi State Bar v. Attorney-Respondent, 367 So. 2d 179, 183 (Miss. 1979).

The statutory scheme also provides that any attorney may be called as a witness at the investigatory hearing. If called, he must be informed of any charges that the complaint counsel might have against him before he testifies. MISS. CODE ANN. § 73-3-315(f) (Supp. 1981).

[111] MISS. CODE ANN. § 73-3-315(b) (Supp. 1981). This privileged appearance is restricted to a statement of admission or denial and does not give the attorney the right to present other testimony or evidence nor afford him the right to confrontation of witnesses. *Id.*

attorney has been guilty of unprofessional conduct, and is of the opinion that a public or private reprimand is sufficient punishment, such reprimand may be administered at that time.[112] If the committee determines that the misconduct warrants suspension or disbarment, a formal complaint must be filed against the accused,[113] and a full evidentiary hearing conducted on an adversary basis must be held before a complaint tribunal.[114] At the conclusion of this hearing, a majority of the tribunal must either dismiss the complaint, reprimand the attorney, suspend him, or permanently disbar him.[115]

In 1981, the Mississippi Supreme Court examined the constitutionality of this statutory procedure in light of the due process clause of both the United States Constitution and the Mississippi Constitution. In *Netterville v. Mississippi State Bar*,[116] an attorney allegedly taped, or had his secretary transcribe, a phone conversation with an adverse party without informing the party of his actions.[117] Subsequently, the adverse party's attorney filed a complaint and the Mississippi State Bar through its complaints committee administered a private reprimand.[118] On appeal to the Mississippi Supreme Court, the charges were dismissed on the basis of insufficient evidence.[119] More importantly, the court held that the state's disciplinary procedure for handling complaints of unethical conduct against attorneys violated due process guarantees as well as the traditional notions of fair play

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[112] *Id.* § 73-3-319(b). In the event of a reprimand, written notice of such a discipline is to be given the complainant, the clerk of the court, the executive director of the state bar, and the judges of the chancery and circuit court districts comprising the residence of the reprimanded attorney. *Id.*

[113] *Id.* § 73-3-319(c).

[114] *See id.* § 73-3-321 (requirements for filing and prosecution of formal complaint); *id.* § 73-3-325 (setting forth requirements of full evidentiary hearing).

[115] *Id.* § 73-3-327.

[116] 397 So. 2d 878 (Miss. 1981).

[117] *Id.* at 881. A widow and her four children were represented by the accused attorney and brought a products liability claim against Hutchinson Manufacturing, alleging that Hutchinson had designed, manufactured, and marketed a defective grain auger that was hazardous to its users. As a result of this defective equipment, the husband of the widow was killed. The accused attorney called one of Hutchinson's stockholders and asked for information regarding the former corporate status of the Hutchinson corporation, without informing the stockholder that the conversation was being recorded. *Id.* at 879-80.

[118] *Id.* at 880-81.

[119] *Id.* at 883; *see* Mississippi State Bar v. Phillips, 385 So. 2d 943, 945 (Miss. 1980) (state supreme court, exercising its power to review evidence, may reverse rulings by administrative agencies not supported by substantial evidence). The court held that the evidence failed to prove sufficiently that the conversation was taped. *Id.*

and substantial justice.[120] In denouncing this procedure, the court recognized that a reprimand, whether public or private, is "neither trifling nor insignificant."[121] The accused attorney, therefore, was entitled to more due process protection than was provided by the one-sided statutory procedure.[122]

The court concluded that in order for future proceedings to meet constitutional requirements, the investigatory hearing must be expanded to permit the accused attorney the privilege of offering transcripts of the testimony of witnesses and the right to cross-examine witnesses whose testimony was taken by the complaint counsel, with the transcripts in each instance being included as part of the complaint counsel's report.[123] The court also stated that any findings of guilt by the complaints committee must now be established by clear and convincing evidence.[124]

In light of the severity of disciplinary measures, *In re Ruffalo*[125] required that an accused attorney be afforded notice and an opportunity to be heard. The Mississippi Supreme Court's decision in *Netterville* is a positive one since it affords an attorney due process protection well within the *Ruffalo* standard. The decision is justifiable because the Mississippi statutory disciplinary procedures allowed an attorney to be reprimanded following an investigatory hearing in which he was not given a sufficient opportunity to be heard. The legislature should take appropriate action to codify the standards mandated by the court.

F. Hall Bailey

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[120] 397 So. 2d at 884.

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.* The court stated that "disciplinary proceedings such as those involved here, while said to be neither civil nor criminal, are of sufficient gravity to require a higher standard of evidence than that the complaints committee merely 'have cause to believe' from the report that the accused attorney is guilty." *Id.*

[125] 390 U.S. 544 (1968); *see supra* notes 100, 101 and accompanying text.

CIVIL PROCEDURE

The Mississippi Supreme Court decided numerous cases during the 1981 term concerning civil procedure.[1] The importance of these

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[1] Belesky v. City of Biloxi, 412 So. 2d 230, 232 (Miss. 1981) (although employees of defendant-city were prospective jurors in present case, trial court's refusal to excuse such prospective jurors for cause held not reversible error); Universal Underwriters Ins. Co. v. Bob Burnham Pontiac Toyota, Inc., 408 So. 2d 1010, 1014 (Miss. 1981) (trial court erred in finding existence of dishonesty and fraudulence as a matter of law); Cortez v. Brown, 408 So. 2d 464, 470-71 (Miss. 1981) (where defendant does not accept additur and appeals the granting of a new trial, scope of appeal limited to whether the lower court abused its discretion by granting the new trial); McDaniel v. Mississippi Power & Light Co., 407 So. 2d 112, 114 (Miss. 1981) (defendant's employee's testimony based on personal knowledge, rather than expertise, does not necessitate being listed as an expert in answer to interrogatories); Gentry v. State, 405 So. 2d 913, 914 (Miss. 1981) (appellant only required to abstract material part of record that he deems necessary for clear understanding of assignments of error); NAACP v. Claiborne Hardware Co., 405 So. 2d 115, 116 (Miss. 1981) (taxing of costs to appellees and appellants); Netterville v. Mississippi State Bar, 404 So. 2d 1026, 1029 (Miss. 1981) (Mississippi State Bar not liable for travel expenses and attorney's fees of attorney acquitted of wrongful conduct); Wiley v. Keen, 404 So. 2d 1025, 1026 (Miss. 1981) (request for peremptory instruction denied where facts warranted jury decision); Birindelli v. Egelston, 404 So. 2d 322, 324 (Miss. 1981) (in county with two judicial districts, failure to make service of process returnable to proper district fatal); Mississippi Action for Community Educ. v. Montgomery, 404 So. 2d 320, 322 (Miss. 1981) (circuit court powerless to set aside judgment against garnishee who failed to answer, absent a showing of fraud, accident, or mistake); Jones v. Ackerman, 403 So. 2d 1282, 1284 (Miss. 1981) (where chancery court has jurisdiction over a suit seeking injunctive relief, it retains jurisdiction and can hear demands for damages; chancellor erred in granting attorney's fees as part of damages where legislature had not granted such authority); Pope v. McGee, 403 So. 2d 1269, 1270 (Miss. 1981) (error to direct verdict for defendant where evidence, although largely circumstantial, raised inference of defendant's liability); Jordan v. First Nat'l Bank, 402 So. 2d 845, 847 (Miss. 1981) (on motion for directed verdict, all reasonable inferences are to be considered in favor of the nonmoving party); Breland v. Bryant, 402 So. 2d 838, 842 (Miss. 1981) (default judgment set aside where plaintiff at hearing filed a new motion and offered evidence only on the second motion); Gee v. Hawkins, 402 So. 2d 825, 827 (Miss. 1981) (on motion for directed verdict, evidence will be construed in light most favorable to nonmoving party); State v Maples, 402 So. 2d 350, 353 (Miss. 1981) (Mississippi Supreme Court has original jurisdiction for purpose of issuing a writ of prohibition); Parker v. State, 401 So. 2d 1282, 1285 (Miss. 1981) (judge's remarks to counsel not ground for reversal where defendant received fair trial); French v. Druetta, 399 So. 2d 1327, 1329 (Miss. 1981) (discovery from personal income tax return not available where same information is ascertainable from other available documents; expense of motion to compel discovery not awarded to movant where opposition is justified in refusing discovery; probated claim cannot be amended where minimum requirements for such a claim have not

cases, however, has been greatly overshadowed by the court's adoption of the Mississippi Rules of Civil Procedure.[2]

I. ADOPTION OF THE RULES

On May 26, 1981, the Mississippi Supreme Court, pursuant to its constitutional authority,[3] as construed in *Newell v. State*,[4] adopted for the circuit, chancery, and county courts[5] the Mississippi Rules of Civil

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been met); Sipe v. Farmer, 398 So. 2d 1325, 1327-28 (Miss. 1981) (error to dismiss counterclaim where it is closely related to the situation giving rise to the incident); Murray v. Huggers Mfg., Inc., 398 So. 2d 1323, 1324 (Miss. 1981) (nonresident "doing business" in state and therefore subject to court's jurisdiction where he makes contract with resident to be fully or partially performed in the state); Commercial Nat'l Bank v. Fleetwood Homes, 398 So. 2d 659, 661 (Miss. 1981) (case transferred from chancery to circuit, or vice versa, dismissed without prejudice where complainant fails to file a declaration within 30 days); Liberty Sav. & Loan Ass'n v. Mitchell, 398 So. 2d 208, 211 (Miss. 1981) (case not dismissed as stale where good cause is shown for delay and no evidence of prejudice by delay exists); Aldridge v. Parr, 396 So. 2d 1027, 1030 (Miss. 1981) (amount of child support set out in decree should be definite); Lewis v. Mass Appraisal Servs., Inc., 396 So. 2d 35, 37 (Miss. 1981) (in taxpayer's suit for misappropriation of funds, taxpayer must prove that funds were appropriated for illegal purpose); Knight v. Moore, 396 So.2d 31, 34 (Miss. 1981) (judge may interpose objections for the benefit of ward where guardian ad litem fails to object); Roach v. Lang, 396 So. 2d 11, 14 (Miss. 1981) (habeas corpus court granting custody of child to one parent does not have continuing jurisdiction to change custody at a later date); Deposit Guar. Nat'l Bank v. E.Q. Smith Plumbing & Heating, Inc., 396 So. 2d 6, 7 (Miss. 1981) (motion to recall and to correct judgment granted where opinion was ambiguous); *In re* R.R.B., 394 So. 2d 907, 908 (Miss. 1981) (failure to remove youth's name and to insert initials on record sent for appeal does not consitute reversible error); Denton v. Maples, 394 So. 2d 895, 898-99 (Miss. 1981) (circuit court loses jurisdiction when case is appealed and any subsequent judgments of the circuit court are null and void); Bethany v. Stubbs, 393 So. 2d 1351, 1355 (Miss. 1981) (mental patient bears burden of proving he is no longer dangerous when seeking dismissal from mental institution); Hart v. Catoe, 393 So. 2d 1346, 1347 (Miss. 1981) (award of statutory damages pursuant to MISS. CODE ANN. § 11-3-23 (Supp. 1981) upon affirmance of judgment or upon failure to prosecute appeal is mandatory, not discretionary); McLeod v. State Bd. of Health, 393 So. 2d 479, 479 (Miss. 1981) (suit to remove name from birth certificate of previous wife's child); Gulf Guar. Life Ins. Co. v. Kelley, 392 So. 2d 518, 520 (Miss. 1981) (apportionment of appeal costs is discretionary when the judgment is affirmnd in part and reversed and rendered in part).

[2] For an extensive analysis of the new Rules, see *Symposium on Mississippi Rules of Civil Procedure*, 52 MISS. L.J. 1 (1982).

[3] *See* MISS CONST. art. VI, § 144 (vesting "judicial power" of state in supreme court).

[4] 308 So. 2d 71 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975); *see infra* notes 20-24 and accompanying text.

[5] *See* MISS. R. CIV. P. 1 (Rules govern procedure in circuit, chancery, and county courts, subject to limitations imposed by rule 81).

Procedure.[6] The Rules, patterned after the Federal Rules of Civil Procedure, took effect on January 1, 1982, and override all inconsistent statutes or court rulings.[7] The supreme court divided sharply over the adoption of the Rules. Voting for the adoption were Chief Justice Patterson and Justices Smith, Robertson, Sugg, and Hawkins.[8] Justice Walker specially concurred in the adoption[9] and Justices Broom, Bowling, and Lee opposed the adoption of the Rules.[10]

In the longest dissenting opinion, Justice Broom contended that the Mississippi Constitution did not grant the supreme court the exclusive power to promulgate procedural rules,[11] that adequate case law existed on which lawyers could rely to determine the correct procedures,[12] that the Rules would not promote the administration of jus-

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[6] Miss. Sup. Ct. Order of May 26, 1981, Miss. Cases 395-397 So. 2d 1 (1981). Procedural reforms in Mississippi civil practice have long been advocated by members of the bench and bar. *See, e.g.,* Abbott, *The Proposed Mississippi Rules of Civil Procedure—An Argument for Adoption,* 49 MISS. L.J. 285, 298 (1978) (call for support of the proposed Rules); Bunkley, *Some Observations on Our Judicial System,* 26 MISS. L.J. 1, 2 (1954) (supreme court should regulate practice and procedure in all courts); Ethridge, *Improving the Machinery of Justice: A Challenge to the Bar,* 37 MISS. L.J. 506, 507 (1966) (improvements needed in Mississippi's judicial system); Fant, *Procedural Reform in Mississippi,* 34 MISS. L.J. 40, 49 (1962) (relaxations of fact pleading); Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform,* 43 MISS. L.J. 287, 310 (1972) (simple and flexible procedural rules); Patterson & Patterson, *A Plea for Procedural Reform in Mississippi,* 42 MISS. L.J. 293, 320 (1971) (need for change in Mississippi practice; advocates adoption of Federal Rules of Civil Procedure for Misisippi's rules of procedure); *Proceedings of the Thirty-Ninth Annual Meeting of the Mississippi State Bar,* 16 MISS. L.J. 299, 336 (1943-1944) (favored a concise system of procedure); Triplett, *Hocus-Pocus Legal Procedure — Need for Reform,* 16 MISS. L.J. 9, 9 (1943-1944) (procedure should allow rapid, accurate, and economical settlements of controversies); Comment, *Procedural Reform in Mississippi: A Current Analysis,* 47 MISS. L.J. 33, 33 (1976) (procedure vulnerable to reform).

[7] Miss. Sup. Ct. Order of May 26, 1981, *supra* note 6, at 1.

[8] *Id.*

[9] *Id.* Justice Walker agreed with the majority's holding that the supreme court had the authority to adopt procedural rules but concluded that the Rules adopted were too comprehensive and that certain rules were substantive in nature, rather than merely procedural. *Id.* at 2.

[10] *Id.* at 1.

[11] *Id.* at 2. Justice Broom based this assertion on MISS. CONST. art. IV, § 90(s), which provides: "The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws . . . [r]egulating the practice in courts of justice . . . ." Justice Broom suggested that the use of the word "shall," instead of "may" or "can," intimated that it is the legislature's duty to regulate court practice. Miss. Sup. Ct. Order of May 26, 1981, *supra* note 6, at 2.

[12] Miss. Sup. Ct. Order of May 26, 1981, *supra* note 6, at 3. *But see* Franck, *supra*

tice,[13] and that the circuit and chancery court judges were in a better position to determine which rules should be added, amended, or deleted.[14]

Whether a state supreme court has inherent rulemaking authority has generated an extensive debate.[15] Rulemaking authority when vested in a court provides the most efficient means by which to im-

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note 6, at 287 ("hodge-podge" of statutes and case law creates confusion).

[13] Miss. Sup. Ct. Order of May 26, 1981, *supra* note 6, at 3.

[14] *Id.* Justice Broom referred to MISS. CONST. art. VI, § 144, which provides that "[t]he judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution," and argued that since "other courts" undoubtedly means circuit, chancery, and county courts and since these courts would bear the burden of applying the new Rules, they should at least be consulted in the promulgation of the Rules. Miss. Sup. Ct. Order of May 26, 1981, *supra* note 6, at 3-4; *c.f.* Grau, *Who Rules the Courts? The Issue of Access to the Rulemaking Process,* 62 JUDICATURE 428, 432 (1979) (not enough public input in rulemaking process; conferences of judges, lawyers, and "legal academics" should formulate rules); Parness & Manthey, *Public Process in State Court Rulemaking,* 63 JUDICATURE 338, 341 (1980) (call for greater public input in rulemaking process); Parness & Manthey, *Public Process and Ohio Supreme Court Rulemaking,* 28 CLEV. ST. L. REV. 249, 249 (1979) (same).

Actually, public input was obtained by the enactment of MISS. CODE ANN. § 9-3-65 (Supp. 1981), which established an Advisory Committee on the Rules of Civil Practice and Procedure in Mississippi, composed of judges from all levels of the judiciary and of practicing attorneys, and *id.* § 9-3-69, which prescribed the duties of the Advisory Committee. Although the Mississippi Supreme Court made a few minor changes after receiving recommendations from the Advisory Committee, there was clearly input from all levels of the legal profession in promulgating the Rules.

Justice Lee argued in his dissenting opinion that the present procedural rules in use prior to the adoption of the new Rules were "adequate." Miss. Sup. Ct. Order of May 26, 1981, *supra* note 6, at 4. Labeling the adoption of the Rules a "fiasco in Mississippi jurisprudence," *id.*, Justice Lee concluded that "it was not the intent or design of the *Newell* Court that now, in one fell swoop, this Court should repeal the procedural statutes of this state (and some substantive law statutes) and re-enact an entire code of such statutes." *Id.* at 5.

In his dissent, Justice Bowling characterized the majority's action as a "dark day in the history of the Mississippi Court System." *Id.* Justice Bowling stated that, prior to the adoption of the Rules, "the Mississippi Courts had a relatively simple procedural system which resulted in the dispositions of court business with relatively small expense" and that "[m]any advocates of 'change' over the years now realize that our present system is one of the best." *Id.* at 6. Justice Bowling concluded that the new Rules would increase significantly the time required to litigate cases through the court system, as well as increase the expense of such litigation. *Id.* at 6-7.

[15] *See In re* Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure, 145 Fla. 223, 199 So. 57, 58 (1940) (few subjects have created more discussion than a court's inherent power to make rules). For a discussion of whether a state supreme court has inherent rulemaking authority, see Annot., 158 A.L.R. 705 (1945), and Annot., 110 A.L.R. 22 (1937).

prove a state's legal system.[16] Forty-seven states have granted their supreme courts the authority to promulgate rules of practice and procedure.[17] Although rules adopted by most state supreme courts are subject to legislative approval,[18] four states have granted their supreme courts unfettered rulemaking authority.[19]

The Mississippi Supreme Court addressed the issue of rulemaking authority in *Newell v. State*,[20] where the court held that section 144 of article VI of the Mississippi Constitution[21] granted to the court the inherent power to promulgate rules of practice and procedure.[22] The

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[16] Ashman, *Measuring the Judicial Rule-Making Power*, 59 JUDICATURE 215, 215 (1975).

[17] Grau, *supra* note 14, at 431.

[18] *E.g.*, Note, *The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87, 90-91 (1971) (legislative control exercised over most judicial rulemaking authority).

[19] The four states are Arizona, Florida, Hawaii, and Michigan. ARIZ. CONST. art. VI, § 1, which is similar to article IV, § 144, of the Mississippi Constitution, provides, "The judicial power shall be vested in an integrated judicial department consisting of a Supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts." In State v. Superior Court, 60 Ariz. 69, 131 P.2d 983 (1942), *rev'd on other grounds*, 74 Ariz. 269, 247 P.2d 617 (1952), the Arizona Supreme Court relied on the "distribution of powers" section and article VI, § 1, of the Arizona Constitution to hold that the courts have inherent rulemaking power and that the courts will accept rules of procedure enacted by the legislature, provided such rules are in "accord with the proper and effective administration of justice." 131 P.2d at 987-88. Article VI, § 1, of the Arizona Constitution has been amended since the *State v. Superior Court* decision, but the version relied on in that case is substantially similar to the present, amended version.

Article V, § 3, of the Florida Constitution states, "The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court." The Florida Supreme Court, in Barton v. State, 193 So. 2d 618, 626 (Fla. 1966), held that procedural rules in all Florida courts would be established by the Florida Supreme Court. The rules established by the court also govern and supersede inconsistent legislative enactments. *E.g.*, Jaworski v. City of Opa-Tacka, 149 So. 2d 33, 34 (Fla. 1963) (rule adopted by court pursuant to FLA. CONST. art. V, § 3, supersedes inconsistent legislative action).

MICH. CONST. art. VI, § 5, provides that the Michigan Supreme Court has the power "by general rules [to] establish, modify, amend and simplify the practice and procedure in all courts of [the] state." The Michigan Supreme Court has held that the rulemaking authority was granted to the Michigan courts by the constitution and that such powers cannot be interfered with by other branches of the government. *In re* "Sunshine Law," 400 Mich. 660, 255 N.W. 2d 635, 636-37 (1977). The court has recognized that this power extends only to the right to promulgate procedures to be followed by the courts, and not to the ability to enact substantive law. People v. Fields, 391 Mich. 201, 216 N.W. 2d 51, 53 (1973).

[20] 308 So. 2d 71 (Miss. 1975).

[21] MISS. CONST. art. VI, § 144.

[22] 308 So. 2d at 76 (citing Matthews v. State, 288 So. 2d 714 (Miss. 1974); Gulf

court determined that legislative statutes concerning procedural matters would be followed "unless determined to be an impediment to justice or an impingement upon the constitution";[23] otherwise, the court would promulgate a rule as they deem necessary.[24]

In response to the pronouncements by the court in *Newell*, the legislature enacted several statutes[25] vesting itself with the authority to participate in the promulgation of any rules for civil practice and procedure. The legislature established an Advisory Committee,[26] which was to draft and to propose a set of rules that would "expedite the administration of justice."[27] The proposed Rules were to be furnished to the supreme court for revision, amendments, and deletions[28] and then forwarded to the legislature for final approval.[29]

The Advisory Committee met each month from July, 1976, to July, 1977, when they completed a preliminary draft of the proposed Rules. The Rules were widely distributed, and five open meetings were held in July and August of 1977, in which both lawyers and laymen were invited to comment upon and to suggest changes in the proposed Rules. The proposed Rules were then presented to the supreme court for approval and editing.[30] On September 7, 1979, the court presented the Rules to the House of Representatives for approval. On October 10, 1979, the House Judiciary Committee, sitting en banc, rejected the proposed Rules.[31] In 1980, the Rules were again sent to the legislature and were again found unacceptable—this time by the Senate Judiciary

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Coast Drilling & Exploration Co. v. Permenter, 214 So. 2d 601 (Miss. 1968); and Southern P. Lumber Co. v. Reynolds, 206 So. 2d 334 (Miss. 1968)).

The court also relied on MISS. CONST. art. I, § 1, which states, "The powers of the government of the state of Mississippi shall be divided into three distinct departments . . . those which are legislative to one, those which are judicial to another, and those which are executive to another." Section 2 of article I further provides in part: "No person or collection of persons, . . . belonging to one of these departments, shall exercise any power properly belonging to either of the others." *Id.* § 2.

[23] 308 So. 2d at 76-77. In construing § 144, the court stated that there was "no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose." 308 So. 2d at 77.

[24] 308 So. 2d at 76.

[25] Act of April 7, 1975, ch. 501, 1975 Miss. Laws 789 (codified at MISS. CODE ANN. §§ 9-3-61 to -73 (Supp. 1981)).

[26] MISS. CODE ANN. § 9-3-65 (Supp. 1981).

[27] *Id.* § 9-3-69.

[28] *Id.*

[29] *Id.* § 9-3-71.

[30] Sams, *Preface* to PROPOSED MISSISSIPPI RULES OF CIVIL PROCEDURE, at I.

[31] MISS. LAW., Nov. 1979, at 5, 5, 7.

Committee, sitting en banc.[32] The supreme court then adopted the proposed Rules, as amended by the court, undoubtedly due to the minimal chance of legislstive approval. The confrontation between the supreme court and the legislature over the new Rules continues to escalate, as evidenced by the 1982 legislative session.[33]

II. Judicial Decisions

In 1981, the supreme court rendered numerous cases concerning procedural matters, but only *Robertson v. Evans*[34] warrants discussion. In *Robertson,* the court indicated that section 147 of the Mississippi Constitution, which prohibits reversal of a circuit or chancery court decree where the only error asserted on appeal is the lower court's lack of jurisdiction,[35] would not automatically preclude transferring a case from chancery to circuit court where the chancery court erroneously assumed jurisdiction.

Robertson arose as a tort action in which Robertson, a minor, sued Evans for damages resulting from an intersectional collision.[36] Robertson brought suit in chancery court,[37] but before the chancellor heard the case, Evans moved to dismiss for want of jurisdiction or, in the alternative, to transfer the suit to circuit court.[38] Evans appealed the interlocutory decree overruling her motion.[39]

On appeal, the supreme court based its decision on article III, sec-

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[32] Miss. Law., July-Aug. 1981, at 8, 8.

[33] *See Foreword* to *Symposium on Mississippi Rules of Civil Procedure, supra* note 2, at 1-2 (discussion of legislative reaction to court's adoption of the Rules). On March 5, 1982, the supreme court amended rule 4 by substituting the prior statutory procedure for service of process and deleted rule 14 entirely. Miss. Sup. Ct. Order of March 5, 1982, slip. op. at 3 (1982).

Chief Justice Patterson responded to the legislature's actions in its 1982 session by writing all county, circuit, and chancery court judges "to remove whatever doubt there is concerning the rules so that stability and orderly procedure might be preserved." Letter from Chief Justice Neville Patterson (April 6, 1982), *reprinted in* Miss. Law., Mar.-Apr. 1982, at 8, 8. Chief Justice Patterson concluded his letter by stating that " '[t]he Mississippi Rules of Civil Procedure, as amended [by the March 5 order,] shall remain in full force and effect until further order of this Court.' " Letter from Chief Justice Patterson, *supra* (quoting Miss. Ct. Order, of March 5, *supra,* at 2).

[34] 400 So. 2d 1214 (Miss. 1981).

[35] Miss. Const. art. VI, § 147, states, "No judgement or decree in any chancery or circuit court rendered in a civil cause . . . shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree . . . . "

[36] 400 So. 2d at 1215.

[37] *Id.*

[38] *Id.*

[39] *Id.*

tion 31, of the Mississippi Constitution, which guarantees the right to trial by jury,[40] and on article VI, section 147.[41] The court denied the Robertson's appeal on the basis of section 147 but, in effect, granted his request by stating that the chancellor "should" transfer the case to circuit court in order to prevent a clear abuse of descretion.[42] Thus, the central question concerns the effect of the supreme court's language regarding the transfer of the case to circuit court. If the effect of the suggestion is to *require* the chancellor to transfer the case, then approximately ninety years of precedent has been disregarded.[43]

Section 147 of the Mississippi Constitution was first interpreted in *Cazeneuve v. Currell*,[44] where the supreme court relied solely on section 147 to hold that it could neither overrule a lower court decision nor order a transfer of a case to the proper forum where the only error asserted was lack of jurisdiction.[45] In addition, the court noted that, since the language of section 147 was unambiguous, the framers of the consitution obviously intended for this prohibition to apply to interlocutory appeals, as well as to final judgments.[46] Staunch opposition to

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[40] MISS. CONST. art. III, § 31, states, "The right of trial by jury shall remain inviolate . . . ." This has been construed to mean that the right to a jury arises in all cases where a jury trial was required at common law. *See* Isom v. Mississippi Cent. R.R., 36 Miss. 300, 309 (1858) (right to trial by jury must be extended to the degree it was provided at common law).

[41] MISS. CONST. art. VI, § 147. See *supra* note 35 for the partial text of § 147.

In *Robertson*, both article III, § 31, and article VI, § 147, of the Mississippi Constitution were discussed in relation to *McLean v. Green*, 352 So. 2d 1312 (Miss. 1977). The *Robertson* court noted that *McLean* did not control since in *McLean* the appeal to the supreme court was taken after the chancery court had rendered judgment, while in *Robertson* the appeal was taken before the case was heard. 400 So. 2d at 1215.

[42] 400 So. 2d at 1215.

[43] *See, e.g.*, Louisville & Nashville R.R. v. Hasty, 360 So. 2d 925, 927 (1978) (suit in chancery will not be reversed merely for want of jurisdiction),*cert. denied*, 439 U.S. 1003 (1979); Harrison v. Landrum, 223 Miss. 207, 212-13, 78 So. 2d 132, 133-34 (1955) (chancery court holding upheld where want of jurisdiction is only error even though question involved was legal and not equitable); Engleburg v. Tonkel, 140 Miss. 513, 523, 106 So. 447, 448 (1926) (chancery court will not be overruled unless error other than want of jurisdiction is asserted); Hancock v. Dodge, 85 Miss. 228, 233, 37 So. 711, 711 (1905) (§ 147 prohibits reversal of chancery court for want of jurisdiction even though plaintiff had adequate remedy at law).

[44] 70 Miss. 521, 13 So. 32 (1893).

[45] *Id.* at 525, 13 So. at 32-33.

[46] *Id.*, 13 So. at 33. The court stated:

> It may be thought by some that the supreme court is forbidden to reverse only final judgments or decrees, when error from want of jurisdiction appears. But the all-sufficient answer to this suggestion is that the framers of the constitution, with a clear apprehension of the distinction between final and interlocu-

the *Cazeneuve* court's interpretation of section 147 appeared in Justice Ethridge's dissent in *Talbot & Higgins Lumber Co. v. McLeod Lumber Co.*[47] In *Talbot & Higgins,* the appellant sued in circuit court for damages arising from the breach of a contract, and the appellee brought suit in chancery court to enjoin the appellant from proceeding with the suit in circuit court, asserting that the appellee had a claim for unliquidated damages against the appellant and that the appellant was insolvent. When the chancery court issed a temporary injunction against the appellant, the appellant moved that the court set aside the injunction. After both sides presented evidence, the court overruled the motion to dissolve the injunction.[48]

The majority in *Talbot & Higgins* determined that the sole question presented was whether the chancery court had jurisdiction to rule on the case.[49] In determining that the chancery court did have jurisdiction over the matter, the majority construed sections 31[50] and 147[51] of the Mississippi Constitution and concluded that a litigant has an inviolate right to a jury trial *except* when a chancellor has erroneously assumed jurisdiction over a matter of law and when want of jurisdiction is the only error asserted.[52]

Justice Ethridge based his dissent on the premise that, since the appellant originally brought the suit in circuit court, where it properly

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> tory decrees and judgments, declare that *no* decree shall be reversed because of want of jurisdiction in the lower court. There is nothing to even suggest that only decrees or judgments determining and settling the merits were included in this constitutional provision.

Id., 13 So. at 33 (emphasis added).

[47] 147 Miss. 186, 192-210, 113 So. 433, 434-41 (1927) (Ethridge, J., dissenting).

[48] *Id.* at 192, 113 So. at 435.

[49] *Id.* at 187-88, 113 So. at 433. The court asserted that "[i]f any error was committed by the court in refusing to dissolve the injunction, such error consisted alone of the fact that the chancery court assumed jurisdiction of a cause of action which was exclusively of common-law jurisdiction." *Id.* at 188, 113 So. at 433.

[50] Miss. Const. art. III, § 31, states in part that "[t]he right of trial by jury shall remain inviolate."

[51] *Id.* art. VI, § 147. See *supra* note 35 for the partial text of § 147.

[52] 147 Miss. at 191, 113 So. at 434. The court stated:

> Construed together, [sections 31 and 147] mean that the right of trial by jury of issues of fact in civil causes in the circuit courts shall remain inviolate, *except* in such cases of exclusively law cognizance as the chancery courts may erroneously assume jurisdiction of, where such error of jurisdiction is the only error in the decree. In such cases the absolute right of trial by jury of the issues of fact is denied; it being discretionary with the chancellor whether such issues of fact shall be tried by a jury.

147 Miss. at 191, 113 So. at 434 (emphasis added).

belonged, and since the trial had already begun, section 147 was inapplicable in the situation presented in *Talbot & Higgins*.[53] Thus, Justice Ethridge distinguished this case from the situation where a complainant merely chooses the wrong forum.[54] Furthermore, Justice Ethridge analyzed sections 159,[55] 160,[56] and 161[57] of the Mississippi Constitution, which grant chancery courts jurisdiction over certain subject matter, and sections 157[58] and 162,[59] which require transfer when the forum court lacks jurisdiction, in light of section 147,[60] and concluded that the framers of the constitution did not intend to confer upon judges the power to hear cases over which they had no jurisdiction.[61] Rather, Justice Ethridge stated that it is the chancellor's duty to transfer cases to the proper court.[62]

The opinion in *Robertson* represents an extension of the reasoning expressed by Commissioner Idom in *McLean v. Green*,[63] where the court stated that, despite the language of section 147, "we look with disfavor upon and consider it an abuse of discretion for a chancellor to assume jurisdiction of a common law action which properly should be tried in a court of law where the right to a trial by jury remains inviolate."[64] The *McLean* court noted that, although section 159(d) of the

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[53] 147 Miss. at 193, 113 So. at 435.

[54] *Id.*, 113 So. at 435.

[55] MISS. CONST. art. VI, § 159, grants the chancery court jurisdiction over matters concerning equity, divorce and alimony, matters testamentary and of administration, minor's business, cases of idiocy, lunacy, and other cases.

[56] MISS. CONST. art. VI, § 160, gives the chancery court jurisdiction over matters concerning title to lands and, jurisdiction to decree rents and compensation for improvements on land.

[57] MISS. CONST. art. VI, § 161, provides the chancery court concurrent jurisdiction with the circuit court on "suits on bonds of fiduciaries and public officers for failure to account for money or property received."

[58] MISS. CONST. art. VI, § 157, states, "All causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court."

[59] MISS. CONST. art. VI, § 162, states, "All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court."

[60] 147 Miss. at 194, 113 So. at 435.

[61] *Id.*, 113 So. at 435. Justice Ethridge noted that the decision in *Cazeneuve* failed to take into consideration sections 157 through 162 of the Mississippi Constitution. 147 Miss. at 199, 113 So. at 437. Futhermore, he asserted that, after viewing these sections as a whole, it was clear that § 147 was not enacted to deny a litigant "any right that inhered in any cause of action." 147 Miss. at 200, 113 So. at 437.

[62] 147 Miss. at 195, 113 So. at 435-36.

[63] 352 So. 2d 1312.

[64] *Id.* at 1314. In *McLean*, the plaintiff brought a personal injury action for damages

constitution vests chancery courts with jurisdiction over minors, the jurisdictional grant is limited to matters concerning equitable relief.[65]

The court held that, since the sole error sustained on appeal concerned the chancery court's erroneous assumption of jurisdiction, the lower court's refusal to transfer or to dismiss the case could not be disturbed.[66] Although the abundance of case law would indicate that section 147 controls in the *Robertson* situation, the precise impact of the supreme court's interpretation of section 147 is unclear. The court did not hold in *Robertson* that section 147 could be bypassed by appealing from an interlocutory decree, since the court denied the appellant's petition.[67] If the chancellor, however, heeds the court's suggestion and transfers the case to circuit court, the appellant's petition, although denied, has been, in effect, granted. The extent of the power contained in the supreme court's suggestion is uncertain, but it may well prove to be a mandate.

R. Nash Neyland

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in the Chancery Court of Adams County. The chancellor overruled the defendant's motion to dismiss or, in the alternative, to transfer the case to circuit court. *Id.* at 1313. The case proceeded to trial and the plaintiff recovered damages. *Id.* at 1313-14. On appeal, the defendant asserted that "[t]he chancellor erred in assuming jurisdiction of and in failing to transfer the cause to the Circuit Court of Adams County." *Id.* at 1314.

[65] *Id.*

[66] *Id.* at 1315.

[67] 400 So. 2d at 1215.

CONTRACT, CORPORATE, AND COMMERCIAL LAW

I. Contract Law

Seventeen cases involving contracts reached the Mississippi Supreme Court in 1981.[1] Two of these cases will be treated textually, and the remainder will be mentioned briefly in the footnotes. The less significant cases concern cancellation and release agreements,[2] assignments,[3] construction of contracts,[4] the right of set-off,[5] statute of

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[1] There were four cases decided in the area of commercial law, none of which will be treated textually. In Ford Motor Co. v. Fairley, 398 So. 2d 216 (Miss. 1981), Ford was precluded from limiting its liability to the amount provided in the warranty since Ford failed to fulfill its express warranty. The supreme court did not clearly state what measure of damages would apply in this case, but implied that the proper measure was the value of the car without defects less the value of the car in its defective condition. *Id.* at 219. In another case dealing with warranties, Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15, 20 (Miss. 1981), a farmer who purchased agricultural equipment was awarded actual and consequential damages for crop loss due to the seller's breach of an express warranty, the implied warranty of merchantability, and the warranty of fitness for a particular purpose.

In Self v. Nelson, 402 So. 2d 822, 824-25 (Miss. 1981), the court held that a purchase at a foreclosure sale was subject to a prior construction lien, since the lien had taken effect without notice at the time of commencing suit to enforce the lien. In Ford v. Defenbaugh, 403 So. 2d 863, 866 (Miss. 1981), a borrower was held to be entitled to a set-off against a consumer loan because of Truth-in-Lending Act violations by the lender and, additionally, was awarded reasonable attorney's fees.

[2] In Anvil Mineral Mining Corp. v. Ravenhorst, 403 So. 2d 142, 145 (Miss. 1981), the court found that the cancellation and release agreement contained no express or implied reservation of commissions on the part of the defendant and held that he forfeited the right to receive any such commissions.

[3] In International Harvester Co. v. Peoples Bank & Trust Co., 402 So. 2d 856, 860 (Miss. 1981), the court found that substantial evidence supported the trial court's holding that an assignment, initially given as collateral for a note, was in fact unconditional and absolute. Additionally, the supreme court found that the appellant-buyer who wrongfully paid a tax levy imposed against the seller was not relieved of a debt owed to the assignee of the seller, as the buyer was under a duty to determine the status of the tax levy. *Id.* at 866-67.

[4] In Mississippi State Highway Comm'n v. Dixie Contractors, Inc., 402 So. 2d 811, 812 (Miss. 1981), the court reversed the chancellor's construction of a contract and held that the manifest error rule did not apply where the issue involved construction of a contract and not a finding of fact.

[5] In Duncan v. Coahoma Bank, 397 So. 2d 891, 893 (Miss. 1981), the court held that the right of set-off exists even where a bank's indebtedness is secured by collateral under a security agreement.

frauds,[6] consideration for new obligations,[7] option contracts,[8] usury,[9] warranties,[10] covenants of continuous use,[11] and other miscellaneous topics.[12]

A. *Purchaser Satisfaction Contracts*

The Mississippi Supreme Court addressed an issue of first impression in *Figg v. Cupit*.[13] In that case, the court held that a purchaser satisfaction contract was created by a notation on the face of a bank draft stating that the purchase was contingent upon approval of the land title.[14] Because the purchaser acted in good faith upon his attor-

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[6] In Beane v. Bowden, 399 So. 2d 1358, 1361 (Miss. 1981), the court held that an oral contract of indefinite duration, but susceptible of performance within 15 months, did not come within the prohibition of the statute of frauds.

[7] In Keller v. Citizens Bank, 399 So. 2d 1332, 1336 (Miss. 1981), the court held that a former legal obligation barred by the statute of limitations was sufficient consideration for a new obligation. The court limited the amount recoverable to the principal of the judgment plus interest for the statutory period.

[8] The court in Graham v. Anderson, 397 So.2d 71, 72-73 (Miss. 1981), held that the seller was not required to complete the sale of his home when the buyer's acceptance was not in accord with the option contract but, rather, amounted to a counter offer.

[9] United Cos. Mortgage & Inv., Inc. v. Lester, 394 So. 2d 1350, 1353 (Miss. 1981), held that usury results only when there is an intentional act that leads to a usurious charge.

[10] In Taylor v. Ward, 393 So. 2d 1342, 1346 (Miss. 1981), the court held that the seller's representation of a bulldozer as being in "A-1 condition" was sufficient to present a jury question as to whether an express warranty had been created.

[11] The court in Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100, 1103 (Miss. 1981), held that a covenant of continuous use would not be inferred where a lease provided for percentage rent in addition to a fixed minimum rent.

[12] *See* Avery, Shanks & Waltman, Inc. v. Giordano-Kirby Ins. Agency, 404 So. 2d 1036, 1037-38 (Miss. 1981) (contract action by one corporation against another corporation not barred by statute of limitations governing oral employment contracts); Ivy v. Grenada Bank, 401 So. 2d 1302, 1303 (Miss. 1981) (appellant's failure to read contract did not remove liability for corporation's debts); Cig Contractors, Inc. v. Mississippi State Bldg. Comm'n, 399 So. 2d 1352, 1356 (Miss. 1981) (court forced to assume that contract was consistent with the pleadings since no copy of contract was attached); Christiansen v. Griffin, 398 So. 2d 213, 215 (Miss. 1981) (appellee did not waive right to renew option period by failing to give required notice); Ward v. Merchants & Farmers Bank, 394 So. 2d 1374, 1375-76 (Miss. 1981) (MISS. CODE ANN. § 75-2-503 (1972) violated by bank's failure to place goods at buyer's disposal and to give notice to buyer, both of which are necessary for delivery).

[13] 401 So. 2d 722 (Miss. 1981).

[14] *Id.* at 725. Cupit agreed to sell Figg a one-half royalty interest in 27 acres of land for 10 years. Figg delivered to Cupit a bank draft that made the purchase contingent upon approval of title through the use of the words "UPON APPROVAL OF TITLE BUT NO LONGER THAN 10 DAYS AFTER ARRIVAL AT COLLECTING BANK."

ney's advice in dishonoring the draft, the court held that the seller had no recourse against the purchaser,[15] despite the fact that the attorney had overlooked certain records that would have cleared the discrepancies in the title.[16]

In reaching its conclusion the court followed the generally accepted rule that the purchaser is the sole judge of his own satisfaction, subject only to the requirements of honesty and good faith.[17] While

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Id. at 723.

[15] *Id.* at 725. The lower court, in response to Cupit's suit for specific performance, ordered Figg to pay an amount equivalent to the balance outstanding on the 10 year term. *Id.* at 724. In reversing the lower court, the Mississippi Supreme Court looked to the law of Louisiana and Texas, since no case law existed on the subject of purchaser satisfaction contracts in Mississippi. *Id.*

In Hardtner v. Dixie Oil Co., 163 La. 1011, 113 So. 357, 357-58 (1927), suit was brought for specific performance of an alleged contract for the purchase of an oil and gas lease. The contract in question consisted of a draft that called for approval of title by the purchaser's attorney. Title was disapproved by the attorney, the purchaser rejected the lease, and the vendor sued for specific performance. The Louisiana Supreme Court stated that in contracts requiring approval of title by the purchaser's attorney, the only issue is whether title is ever approved; the question of whether title is good and merchantable does not arise. 113 So. at 358. The court concluded that this was especially true in the oil business where no reputable company desires to accept any title that appears defective in any way and that might end up in litigation. *Id.*

In Smith v. McMillan, 352 S.W.2d 871 (Tex. Civ. App. 1961), the Texas court held that when it is necessary to show a good and merchantable title to the satisfaction of the buyer's attorney, such a provision must be given effect. Therefore, a purchaser will not be required to take title that his attorney finds defective so long as the attorney's failure to approve the title is not arbitrary or in bad faith. *Id.* at 875-76; *see also* Campbell v. Hart, 256 S.W.2d 255, 263 (Tex. Civ. App. 1953) (contract to furnish title satisfactory to the purchaser should be judicially recognized and enforced); Dixie Oil Co. v. McBurnett, 6 S.W.2d 83, 84 (Tex. Civ. App. 1928) (vendor not entitled to specific performance of contract that is subject to attorney's approval of title unless bad faith is shown in the rejection).

[16] 401 So. 2d at 724. Figg's attorney found four items he considered questionable and refused to approve the title. *Id.* The first concern was an outstanding reservation of one-half of the minerals. The second concern was that the deed had not been signed by Cupit's wife who was a joint tenant. The last two concerns related to the survey description and the acreage content. *Id.* It was later discovered that the attorney had overlooked certain records that would have cleared the discrepancies in the title. *Id.* at 724. An earlier deed granted Cupit's predecessor in title the outstanding mineral interest. Furthermore, Cupit's wife died prior to the execution of the royalty deed. *Id.*

[17] Annot., 47 A.L.R.2D 455, 457 (1956). This annotation places Mississippi in the category of states requiring the grantee to be satisfied with a good or marketable title. This opinion is based on dictum in Roberts v. Kimmons, 65 Miss. 332, 3 So. 736 (1887). *Roberts,* however, has not been cited in Mississippi for this proposition, and the Mississippi Supreme Court considered *Figg* to be a case of first impression. 401 So. 2d at 724. For a discussion of different viewpoints, see 77 AM. JUR. 2D *Vendor and Purchaser* § 129

some courts require the purchaser to be satisfied when the title is in fact good,[18] the court's decision is proper since a purchaser satisfaction contract is nothing more than a contract satisfying the law of conditions.[19]

B. *Rights of Persons Eighteen Years of Age or Older to Enter into Contracts Settling Tort Claims for Personal Injury*

Garrett v. Gay[20] represents an important decision concerning the rights of persons eighteen years of age or older to enter into contracts.[21] In this case, Garrett suffered severe personal injuries when Gay drove her automobile into the motorcycle that Garrett was riding.[22] About seven months later, when Garrett was twenty years and nine months of age, he executed a release, which freed Gay from all claims for injuries sustained in the collision.[23] Garrett also obtained a decree removing his disability of minority for the purpose of executing the release.[24] The Mississippi Supreme Court affirmed the lower court's dismissal of Garrett's suit in which he claimed the decree authorizing the release was invalid.[25]

The supreme court found that since section 93-19-13 of the Mississippi Code allows persons eighteen years of age or older to enter into contracts affecting personal property,[26] the decree removing Garrett's

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(1975).

[18] Annot., *supra* note 17, at 462-66.

[19] 3A A. CORBIN, CONTRACTS § 644 (1960). A conditional contract is an executory contract, the performance of which depends on a contingency and a condition. 17 C.J.S. *Contracts* § 10 (1963). In many contracts, there may be a provision calling for an act by a third person as a condition of the promisor's duty to pay money or to complete performance. An example of this would be a contract in which there is a promise to buy land subject to the approval of title by an attorney. 3A A. CORBIN, *supra*, § 649; *see also* Annot., 16 A.L.R.3D 1424, 1435-38 (1967) (variance in acceptance based on attorney's approval).

[20] 394 So. 2d 321 (Miss. 1981).

[21] *Id.* at 322-23.

[22] *Id.* at 321.

[23] *Id.* Garrett received $45,000 consideration for this release. *Id.* at 322.

[24] *Id.*

[25] *Id.*

[26] MISS. CODE ANN. § 93-19-13 (Supp. 1980) provides:

> All persons eighteen (18) years of age or older, if not otherwise disqualified, or prohibited by law, shall have the capacity to enter into binding contractual relationships affecting personal property. Nothing in this section shall be construed to affect any contracts entered into prior to July 1, 1976.
>
> In any legal action founded on a contract entered into by a person eighteen (18) years of age or older, the said person may sue in his own name as an

disability for the purpose of executing the release was unnecessary.[27] The next question confronting the court was whether the language "personal property" as used in the statute included a tort claim for personal injuries.[28] The court noted that section 1-3-41 of the Mississippi Code provides that personal property includes effects, evidences of rights in action, and all written instruments creating any right in any real or personal estate.[29] In addition, personal property has been held by the Mississippi Supreme Court to include evidence of debt[30] and choses in action.[31] Thus, the *Garrett* court concluded that the language of section 93-19-13 authorized persons eighteen years or older to enter into contracts affecting personal property, including the right to settle claims for personal injuries.[32]

II. Corporate Law

While there was a dearth of judicial decisions involving corporate law in 1981,[33] important changes were made in the corporate area by

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adult and be sued in his own name as an adult and be served with process as an adult.

[27] 394 So. 2d at 322.

[28] *Id. Garrett* is the first case construing § 93-19-13 since its enactment in 1976.

[29] Miss. Code Ann. § 1-3-41 (1972) provides:

The term "personal property," when used in any statute, shall include goods, chattels, effects, evidences of rights of action, and all written instruments by which any pecuniary obligation, or any right, title, or interest in any real or personal estate, shall be created, acknowledged, transferred, incurred, defeated, discharged, or diminished.

[30] First Nat'l Bank v. Ellison, 135 Miss. 42, 49, 99 So. 573, 575 (1924). In *First National* the court construed § 1-3-41 and held that personal property includes things in action and evidences of debt. The court stated that "effects" defines property in a more extensive sense and, thus, includes things in action. *Id.*, 99 So. at 575.

[31] Watson v. Caffery, 236 Miss. 223, 233, 109 So. 2d 862, 866 (1959). The *Watson* court held that personal property includes everything that may be owned, except land or any interest in land, and that has an exchangeable value. *Id.*, 109 So. 2d at 866; *see also* 73 C.J.S. *Property* § 9 (1951) (choses in action).

[32] 394 So. 2d at 323.

[33] The Mississippi Supreme Court decided only one case dealing with corporate law: Liberty Sav. & Loan Ass'n v. Mitchell, 398 So. 2d 208 (Miss. 1981). This case, in which the corporation alleged a breach of fiduciary duty by a former officer and director, was dismissed by the lower court as a stale claim. Based on the complexity of the case, which required tremendous preparatory work for trial, and the fact that the plaintiff's chief counsel had been killed in an accident, the court determined that the action was not stale and, thus, remanded the case for further consideration. *Id.* at 208-11. In addition, the court rejected the defendant's argument on cross-appeal that the suit by the savings and loan association was barred by the fact that the corporation was acquired by a successor corporation after the alleged breach of duty had occurred. The defendant based

the legislature's adoption of the Mississippi Securities Act (new Act).[34] This review will present a discussion of the significant provisions of the new Act, the distinctions between the new Act and prior law,[35] and the significant differences between the new Act and the Uniform Securities Act as adopted by the National Conference of Commissioners on Uniform State Laws.[36] The new Act's effect on pending proceedings, registrations under prior law, and offerings or sales begun under prior exemptions will also be discussed.

A. Significant Provisions of the New Act

Sections 75-71-301 through -333 of the Mississippi Code deal generally with the registration of broker-dealers, agents, and investment advisers.[37] The new Act requires broker-dealers,[38] agents of

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this contention on MISS. CODE ANN. § 79-3-93 (1972), which provides that only stockholders of record at the time the cause of action arose may bring suit. The court held, however, that Liberty's assignment of all properties and assets to the successor corporation included assignment of the cause of action. 398 So. 2d at 211-12.

[34] Act of April 23, 1981, ch. 521, 1981 Miss. Laws 1521 (codified at MISS. CODE ANN. §§ 75-71-101 to -735 (Supp. 1981)).

[35] MISS. CODE ANN. §§ 75-71-1 to -57 (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552. The Mississippi Legislature first adopted the Mississippi Securities Act in 1916. Act of April 3, 1916, ch. 97, 1916 Miss. Laws 87. Subsequent amendments were made in 1930, Act of May 10, 1930, ch. 89, 1930 Miss. Laws 213, in 1932, Act of May 18, 1932, ch. 88, 1932 Miss. Laws 75, in 1942, Act of March 19, 1942, ch. 297, 1942 Miss. Laws 398, in 1958, Act of May 8, 1958, ch. 202, 1958 Miss. Laws 315, and in 1964, Act of April 22, 1964, ch. 272, 1964 Miss. Laws 358. These laws are frequently called Blue Sky Laws because the legislation was aimed at "speculative schemes which [had] no more basis than so many feet of 'blue sky.'" Hall v. Geiger-Jones Co., 242 U.S. 539, 550 (1917).

[36] UNIF. SEC. ACT, 7A U.L.A. 562 (1978). The Uniform Securities Act was approved on August 25, 1956, and has been adopted in whole or in part in 34 other jurisdictions. *Id.* at 307 (Supp. 1982). Mississippi amended its Blue Sky Laws soon after the Uniform Act was passed but did not borrow significantly from the Uniform Act. Comment, *Selling the Blue Sky in Mississippi—A Comparison of the Mississippi Securities Act with the Uniform Securities Act*, 35 MISS. L.J. 421, 421 (1964). The Uniform Securities Act contains four parts. The first three encompass the basic blue sky philosophies: (1) fraud; (2) registration of broker-dealers, agents, and investment advisers; and (3) registration of securities. The last part contains general provisions such as definitions, exemptions, and procedure. UNIF. SEC. ACT, *supra*, at 562.

[37] MISS. CODE ANN. §§ 75-71-301 to -333 (Supp. 1981).

[38] *Id.* § 75-71-301. In addition to registering himself, a broker-dealer is permitted to employ only those agents who are registered. The beginning and termination of activities between broker-dealers and agents must be reported promptly to the Secretary of State by the agent and the broker-dealer. *Id.*

This statute replaced MISS. CODE ANN. § 75-71-31 (1972). In First Mobile Home Corp. v. Little, 298 So. 2d 676 (Miss. 1974), the court applied the term "seller" under §

issuers,[39] and investment advisers[40] to register with the Secretary of State. Although the term "investment adviser" is defined broadly in the new Act, it is important to note that the new Act excludes several categories of individuals from this classification.[41] The new Act also calls for a surety bond in the sum of $10,000 to be posted by broker-dealers and investment advisers in order to register.[42]

One of the most significant provisions of the new Act allows a re-

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75-71-31 and held a corporation liable as a "seller" when it issued its stock without a certificate of authority. *Id.* at 681.

[39] MISS. CODE ANN. § 75-71-301 (Supp. 1981).

[40] MISS. CODE ANN. § 75-71-303 (Supp. 1981) provides:

> It is unlawful for any person to transact business in this state as an investment adviser unless (1) he is so registered under this chapter; or (2) he is registered as a broker-dealer; or (3) his only clients in this state are investment companies as defined in the Investment Company Act of 1940 or insurance companies.

[41] MISS. CODE ANN. § 75-71-105(e) (Supp. 1981) provides:

> "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" does not include (1) a bank, savings institution or trust company; (2) a lawyer, accountant, engineer or teacher whose performance of these services is solely incidental to the practice of his profession; (3) a broker-dealer whose performance of these services is solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation for them; (4) a publisher of any bona fide newspaper, news magazine or business or financial publication of general, regular and paid circulation; (5) a person whose advice, analyses or reports relate only to securities exempted by section 75-71-201(1); (6) a person who has no place of business in this state if (A) his only clients in this state are other investment advisers, broker-dealers, banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or, (B) during any period of twelve (12) consecutive months he does not direct business communications into this state in any manner to more than five (5) clients other than those specified in clause (A) of this subsection, whether or not he or any of the persons to whom the communications are directed is then present in this state; or (7) such other persons not within the intent of this subsection as the secretary of state may by rule or order designate.

[42] *Id.* § 75-71-319. The bond must be made with a surety company authorized to do business in Mississippi. A suit on the bond must be brought within two years after the sale, unless the person entitled to bring suit dies within the two years, in which case, the deceased's executor or administrator has one year from the date of death to file suit. *Id.*

gistration by a coordination procedure.[43] This procedure provides a streamlined method for registering securities with the Secretary of State. Any security for which a registration statement has been filed under the Securities Act of 1933[44] in connection with the same offering may be registered by coordination.[45] The result is that a multi-state issue may be registered with much less effort than before by providing a less detailed registration statement than that required in registration by qualification.[46] Section 75-71-403(c) provides that a registration statement filed under the new Act automatically becomes effective at the moment a registration statement filed under the Securities Act of 1933 becomes effective, as long as certain conditions are met.[47]

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[43] *Id.* § 75-71-403. Under this procedure, a registration statement must contain a copy of the latest prospectus filed under the Securities Act of 1933, as well as any other information filed under that Act and requested by the Secretary of State. Additionally, any amendments to the federal prospectus, except those changing the effective date, must be provided no later than the first business day after the amendments are sent to or filed with the SEC. *Id.*

[44] 15 U.S.C. § 77a (1976).

[45] *See supra* note 43.

[46] MISS. CODE ANN. § 75-71-405 (Supp. 1981) outlines the detailed information required to register a security by qualification. For example, the registration statement must include information about the business in which the issuer is engaged, the capitalization and long-term debt of the issuer, the kind and amount of securities to be offered, the basis upon which the offering is to be made if for something other than cash, the estimated aggregate underwriting and selling discounts or commissions and finders' fees, a description of the distribution plan of any securities that are to be offered other than through an underwriter, and other details concerning the offering. *Id.*

[47] MISS. CODE ANN. § 75-71-403(c) (Supp. 1981) provides:

> (c) A registration statement under this section automatically becomes effective at the moment the federal registration statement becomes effective if all the following conditions are satisfied: (1) no stop order is in effect and no proceeding is pending under section 75-71-425 through 75-71-431; (2) the registration statement has been on file with the secretary of state for at least ten (10) days and (3) a statement of the maximum and minimum proposed offering prices and the maximum underwriting discounts and commissions has been on file for two (2) full business days or such shorter period as the secretary of state permits by rule or otherwise and the offering is made within those limitations. The registrant shall promptly notify the secretary of state by telephone or telegram of the date and time when the federal registration statement became effective and the content of the price amendment, if any, and shall promptly file a post-effective amendment containing the information and documents in the price amendment. "Price amendment" means the final federal amendment which includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price. Upon failure to receive the required notification and post-effective amendment with respect to the price amendment, the secretary of state may enter a stop order, without notice or

The new Act contains a liberal definition of fraud in the sale or purchase of any security, thus allowing courts broad discretion in resolving individual cases.[48] Section 75-71-503 prohibits an investment adviser from engaging in fraudulent practices with respect to the value of securities or their purchase or resale.[49]

Willful violations of the new Act are punishable by a fine of not more than $25,000 or imprisonment for not more than five years, or both.[50] Lack of knowledge of a rule or order is a valid defense.[51] The statute of limitations for willful violations under the new Act is five years after the date of the alleged violation.[52]

Civil liability is addressed in section 75-71-717. A purchaser is allowed a cause of action against a seller or offeror of securities for a violation of any provision of the new Act or for fraud in the sale.[53] The

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hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this subsection, if the secretary of state promptly notifies the registrant by telephone or telegram (and promptly confirms by letter or telegram when he notifies by telephone) of the issuance of the order. If the registrant proves compliance with the requirements of this subsection as to notice and post-effective amendment, the stop order is void as to the time of its entry. The secretary of state may by rule or otherwise waive either or both of the conditions specified in clauses (2) and (3) of this subsection. If the federal registration statement becomes effective before all the conditions in this subsection are satisfied and they are not waived, the registration statement automatically becomes effective as soon as all the conditions are satisfied. If the registrant advises the secretary of state of the date when the federal registration statement is expected to become effective, the secretary of state shall promptly advise the registrant by telephone or telegram, at the registrant's expense, whether all the conditions are satisfied and whether he then contemplates the institution of a proceeding under sections 75-71-425 through 75-71-431; but this advice by the secretary of state does not preclude the institution of such a proceeding at any time.

[48] MISS. CODE ANN. § 75-71-501 (Supp. 1981) provides as follows:

It is unlawful for any person, in connection with the sale or purchase of any security, directly or indirectly,

(1) To employ any device, scheme or artifice to defraud;

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

Accord 17 C.F.R. § 240.10b-5 (1981) (federal rule governing sales of securities).

[49] MISS. CODE ANN. § 75-71-503 (Supp. 1981).

[50] *Id.* § 75-71-735.

[51] *Id.*

[52] *Id.*

[53] MISS. CODE ANN. § 75-71-717 (Supp. 1981) provides:

purchaser may bring suit either at law or in equity to recover the amount paid for the securities, along with eight percent interest from the date of payment, costs, and reasonable attorney's fees.[54] The scope of liability includes all those who materially aid in the sale, including employees of a seller liable under section 75-71-717.[55] The cause of action survives the death of any person who might have been a plaintiff or defendant.[56] The statute of limitations for civil actions based on a violation of a provision of the new Act is two years, beginning with the date of the violation.[57] The statute of limitations for an action based on fraud is also two years, but it begins to run from the date the fraud was or should have been discovered.[58] Under the new Act, the Secretary of State may give interpretive opinions upon request.[59]

B. Distinctions Between the New Act and Prior Law

Prior to the legislature's adoption of the new Act, Mississippi's securities laws were codified in sections 75-71-1 through -57 of the Mississippi Code. Under prior law, investment companies were required to

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> Any person who (1) offers or sells a security in violation of any provision of this chapter, or (2) offers or sells a security by the use of any written or oral communication which contains any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent (8%) per year from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at eight percent (8%) per year from the date of disposition.

This statute replaced MISS. CODE ANN. § 75-71-25 (1972).

[54] *Id.* § 75-71-717 (Supp. 1981).

[55] *Id.* § 75-71-719. A non-seller may not be held liable if he can show "that he did not know, and in exercise of reasonable care could not have known of the existence of the facts by reason of which the liability is alleged to exist." *Id.* There is contribution among the persons held liable under this section. *Id.*

[56] *Id.* § 75-71-723.

[57] *Id.* § 75-71-725.

[58] *Id.*

[59] MISS. CODE ANN. § 75-71-111(e) (Supp. 1981) provides that the Secretary of State has discretion to honor requests from interested persons for interpretive opinions.

file a surety bond with the Secretary of State to register an issue.[60] The bond was equal to five percent of the aggregate offering price of the securities to be issued, with the exception that it could not be less than $500 nor more than $50,000.[61] The new Act does not require a bond in order to register a security. Broker-dealers and investment advisers, however, must file a $10,000 bond in order to register.[62]

Previously, Mississippi law did not require the registration of investment advisers. The new Act not only requires such registration,[63] but also allows the Secretary of State to establish a minimum capital requirement for broker-dealers and investment advisers.[64] This of course is an attempt to provide protection to the investing public by preventing under-capitalized persons from operating in the state. The post-registration requirements in section 75-71-333 allow the Secretary of State to examine periodically financial and other records of all registered broker-dealers and investment advisers as the Secretary deems necessary.[65] If violations are discovered, the registration may be sus-

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[60] *Id.* § 75-71-13 (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

[61] MISS. CODE ANN. § 75-71-13 (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

[62] MISS. CODE ANN. § 75-71-319 (Supp. 1981). Under former law bond was required to register an issue. Additionally, every applicant for a dealer's permit had to file a surety bond in the amount of $5,000. With the Secretary of State's permission, however, an applicant could, in lieu of the surety bond, file State of Mississippi General Obligation Bonds or State of Mississippi Highway Bonds in the amount of $5,000. *Id.* § 75-71-29 (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

The new Act provides that an action to enforce liability of the bond must be brought within two years after the sale. If the person entitled to bring suit dies within the two years, the suit may be brought by his executor or administrator after the two years have expired but within one year after death. MISS. CODE ANN. § 75-71-319 (Supp. 1981).

[63] *See supra* note 40.

[64] MISS. CODE ANN. § 75-71-317 (Supp. 1981).

[65] MISS. CODE ANN. § 75-71-333 (Supp. 1981) provides:

> (a) *Books and accounts.* Every registered broker-dealer and investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books and other records as the secretary of state by rule prescribes. All records so required shall be preserved for three (3) years unless the secretary of state by rule prescribes otherwise.
>
> (b) *Financial Reports.* Every registered broker-dealer and investment adviser shall file such financial reports as the secretary of state by rule prescribes.
>
> (c) *Corrections.* If the information contained in any document filed with the secretary of state is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment.
>
> (d) *Inspection Power.* All of the records referred to in subsection (a) of this section are subject at any time to such reasonable periodic, special or other examinations by representatives of the secretary of state, within or without the

pended or revoked.[66] As a further protection to the public, the Secretary of State may require that investment advisers take an examination before qualifying as an investment adviser.[67]

There is no provision under prior law for registration by coordination. This, as discussed earlier,[68] is a significant change in the law and should allow for easier and less expensive registration of multi-state issues.

The new Act makes some changes from the exemptions provided under previous law. Under prior law, all negotiable promissory notes or commercial paper were exempted from the requirements imposed on non-exempt securities.[69] The new Act exempts only commercial paper that evidences an obligation to pay cash within nine months of the date of issuance.[70] Another change relates to the exemption of securities of cooperatives. Previously, all stockholders of the cooperative were required to be bona fide legal residents of Mississippi.[71] The new Act removes this restriction, provided the cooperative holds a letter of determination by the Internal Revenue Service finding the cooperative qualified under section 521 of the Internal Revenue Code.[72] An exemp-

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state of Mississippi, as the secretary of state deems necessary or appropriate in the public interest or for the protection of investors.

[66] *Id.* § 75-71-321. The Secretary may suspend or revoke the registration if it is in the public interest and the application for registration is incomplete or contains false or misleading information. Other violations that may lead to suspension or revocation include the conviction of the registrant within the preceding 10 years of any misdemeanor involving a security, insolvency of the registrant, or a finding that the registrant has engaged in dishonest or unethical practices involving securities. The Secretary may deny, suspend, or revoke any registration if the registrant fails to supervise his agents or employees. *Id.*

[67] MISS. CODE ANN. § 75-71-323 (Supp. 1981) provides that the examination "may be written or oral or both, to be taken by any class of or all applicants, as well as persons who represent or will represent an investment adviser in doing any of the acts which make him an investment adviser."

[68] *See supra* notes 43-47 and accompanying text.

[69] MISS. CODE ANN. § 75-71-51(8) (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

[70] MISS. CODE ANN. § 75-71-201(10) (Supp. 1981) lists as a category of exempt securities:

> Any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine (9) months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited, or any guarantee of such paper or of any such renewal . . . .

[71] *Id.* § 75-71-51(11) (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

[72] MISS. CODE ANN. § 75-71-201(12) (Supp. 1981). Cooperatives exempt from taxa-

tion in the new Act, which was not allowed under the prior Blue Sky Laws, provides that any investment contract issued in connection with an employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan is not covered by the registration requirement.[73]

Only one of the exempt transactions under prior law was not incorporated into the new Act.[74] The deleted exemption relates to the exchange of one corporation's stock for all or substantially all the assets of a second corporation.[75] The remaining exempt transactions under prior law are contained in the new Act, as well as some that were not allowed before. For example, any transaction between the issuer and underwriters is exempt.[76] Additionally, an offer or sale of a preorganization certificate is not required to be registered if certain conditions are met.[77] Other differences between the new Act and the Blue Sky Laws include the provision in the new Act exempting any isolated non-issuer transaction, whether effected through a broker-dealer or not.[78] The new Act also exempts any non-issuer distribution of outstanding securities where there is a recognized securities manual,[79] or where the security has a fixed maturity or fixed interest or dividend provision and certain conditions are met.[80] These exemptions were not included in previous Mississippi securities law.

The new Act provides that reasonable attorney's fees are recoverable by the purchaser in all instances involving a seller's liability for

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tion include farmers, fruit growers, or similar associations organized for the purpose of marketing products of members and returning the proceeds of sales to them, or for the purpose of purchasing supplies and equipment for the use of members and turning over such supplies and equipment to them at actual cost. I.R.C. § 521 (1976).

[73] MISS. CODE ANN. § 75-71-201(11) (Supp. 1981).

[74] *Id.* § 75-71-53(5) (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

[75] MISS. CODE ANN. § 75-71-53(5) (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

[76] MISS. CODE ANN. § 75-71-203(4) (Supp. 1981).

[77] *Id.* § 75-71-203(11). The conditions that must be met are (1) no payment is permitted directly or indirectly for the purpose of soliciting any prospective subscriber, (2) the number of subscribers cannot exceed 35, and (3) no payment can be made by any subscriber. *Id.*

[78] *Id.* § 75-71-203(1).

[79] *Id.* § 75-71-203(2). The securities manual must contain the names of the issuer's officers and directors, a balance sheet, and a profit and loss statement. *Id.*

[80] *Id.* Additionally, there must have been "no default during the current fiscal year or within the three (3) preceding fiscal years, or during the existence of the issuer and any predecessors if less than three (3) years, in the payment of principal, interest or dividends on the security." *Id.*

illegal or fraudulent sales.[81] Under prior law, attorney's fees could be recovered only when suit was brought on a bond under section 75-71-25 of the Mississippi Code.[82] The new Act also allows recovery of interest at the rate of eight percent per year.[83]

C. *Significant Differences Between the New Act and the Uniform Securities Act as Adopted by the National Conference of Commissioners on Uniform State Laws*[84]

The new Act does not include sections 102(b) and (c) of the Uniform Securities Act, which place certain restrictions on investment advisory contracts[85] and make it unlawful for investment advisers to maintain custody of a client's securities or funds under certain conditions.[86] Section 302 of the Uniform Act, which provides complex rules for registration by notification,[87] is also deleted.

The new Act expands the definition of "security" to include specifically any interest in a limited partnership.[88] The scope of civil lia-

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[81] *See supra* note 53.

[82] MISS. CODE ANN. § 75-71-25 (1972), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552.

[83] *See supra* note 53.

[84] *See supra* note 36.

[85] UNIF. SEC. ACT § 102(b), *supra* note 36, at 573-74. An investment adviser is prohibited from entering into an advisory contract unless it provides in writing that the adviser shall not be compensated on the basis of a share of capital gains of the client's funds, that no assignment of the contract can be made by the adviser without the other party's consent, and that the adviser shall, in the case of a partnership, notify the other party of any change in the partnership's membership. *Id.*

[86] *Id.* § 102(c), at 574. The investment adviser cannot have custody of the client's securities or funds if the administrator by rule prohibits it, or if there is no such rule, where the adviser fails to notify the administrator that he has custody. *Id.*

[87] *Id.* § 302, at 599-601.

[88] MISS. CODE ANN. § 75-71-105(k) (Supp. 1981) provides:

> "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease; interest in a limited partnership; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period.

bility in the new Act is expanded to encompass violations of any of the provisions of the new Act,[89] in contrast to the Uniform Act, which limits civil liability to violations of specific sections.[90] In addition, the new Act deletes a provision in the Uniform Act that prohibits a purchaser from bringing suit against the seller if the seller makes an offer to refund the purchase price with interest.[91] Also deleted is language in the Uniform Act that prohibits courts from expanding coverage of the Act beyond that specified.[92]

Both the new Act and the Uniform Act contain a provision that all outstanding securities in the same class are considered to be registered for the purpose of any non-issuer transaction provided the registration statement is effective.[93] The Uniform Act goes one step further and provides that a non-issuer may continue to sell the security within a certain time period even though the registration statement has been revoked.[94] This provision is not included in the new Act.

The Uniform Act prohibits the Secretary of State from instituting a stop-order proceeding against an effective registration statement if the proceeding was based on a fact or transaction known to the Secretary of State when the registration statement became effective, unless the proceeding is instituted within thirty days after the registration became effective.[95] This provision does not appear in the new Act.[96]

The previous statute in Mississippi was more restrictive in its definition of a security. *See* MISS. CODE ANN. § 75-71-5(c) (1972) (more restrictive than Uniform Act), *repealed by* Act of April 23, 1981, ch. 521, § 418, 1981 Miss. Laws 1521, 1552; UNIF. SEC. ACT § 401(*l*), *supra* note 36, at 628 (broader coverage in definition). The new Act's definition of a security is identical to the one found in the Uniform Securities Act except for the inclusion of the phrase "interest in a limited partnership" in the Mississippi definition. *See* MISS. CODE ANN. § 75-71-105(k) (Supp. 1981) (more inclusive definition); UNIF. SEC. ACT § 401(e), *supra* note 36, at 628 (definition not as broad as new Act).

[89] *See* MISS. CODE ANN. § 75-71-717 (Supp. 1981) (civil liability for violation of statute). For the text of this statute, see *supra* note 53.

[90] UNIF. SEC. ACT § 410(a)(1), *supra* note 36, at 670.

[91] *Id.* § 410(e)(1), at 671.

[92] *Id.* § 410(h), at 671. This provision states that "rights and remedies provided by this act are in addition to any other rights . . . but this act does not create any cause of action not specified in this section or section 202(e)." The new Act stops short of this limiting language, stating only that "the rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity." MISS. CODE ANN. § 75-71-731 (Supp. 1981).

[93] MISS. CODE ANN. § 75-71-419 (Supp. 1981). The new Act's counterpart is UNIF. SEC. ACT § 305(i), *supra* note 36, at 614-15.

[94] UNIF. SEC. ACT § 305(i), *supra* note 36, at 614-15.

[95] *Id.* § 306(a)(2)(I), at 614-15.

[96] MISS. CODE ANN. § 75-71-425 (Supp. 1981).

D. Effect on Pending Proceedings, Registrations under Prior Law, and Offerings or Sales Begun under Prior Exemptions

Although the new Act became effective on July 1, 1981,[97] provision was made for those proceedings already underway on that date. The new Act provides that suits pending on July 1, 1981, or that might be initiated on the basis of facts occurring prior to that date, will be governed by prior law.[98] All effective registrations under prior law remain in effect but are governed by the former law.[99] Any sales made within one year after July 1, 1981, pursuant to an offering begun in good faith before that date also come under prior law.[100]

James A. Keith

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[97] Act of April 23, 1981, ch. 521, § 419, 1981 Miss. Laws 1521, 1553.
[98] MISS. CODE ANN. § 75-71-121 (Supp. 1981).
[99] *Id.* § 75-71-123.
[100] *Id.* § 75-71-125.

CRIMINAL LAW AND PROCEDURE

In 1981 the Mississippi Supreme Court rendered important decisions in the areas of probable cause, the right to a speedy trial, and the procedure for convicting and sentencing habitual criminals.[1]

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[1] Decisions handed down in 1981 that are not treated textually are: Davis v. State, 406 So. 2d 795, 801 (Miss. 1981) (defense counsel's failure to preserve closing in trial record prevented court from granting mistrial based on prosecution's comment on defendant's failure to deny rape charge); Weed v. State, 406 So. 2d 24, 29 (Miss. 1981) (admissibility of evidence of victim's drug use where defendant asserts self-defense); Cole v. State, 405 So. 2d 910, 912-13 (Miss. 1981) (mental capacity to determine right from wrong); Owens v. State, 405 So. 2d 692, 694 (Miss. 1981) (marital privilege); Sanders v. State, 403 So. 2d 1288, 1290-91 (Miss. 1981) (warrantless search of automobile passenger compartment valid as search incident to lawful custodial arrest); Shepard v. State, 403 So. 2d 1287, 1288 (Miss. 1981) (conviction dismissed on insufficient evidence); Ivory v. State, 403 So. 2d 1284, 1285-86 (Miss. 1981) (under earned release program, prisoner entitled to credit for time spent in program upon reincarceration); Henry v. State, 403 So. 2d 1281, 1282 (Miss. 1981) (auto search); Mansell v. State, 403 So. 2d 871, 874 (Miss. 1981) (evidence of defendant's statement to trusty not *Miranda* violation since trusty not law enforcement agent); Harrigill v. State, 403 So. 2d 867, 868-69 (Miss. 1981) (absent statute, no circuit court authority to modify affirmed judgment and sentence); Murray v. State, 403 So. 2d 149, 151-52 (Miss. 1981) (essential elements of aggravated assault); Ragland v. State, 403 So. 2d 146, 147 (Miss. 1981) (prima facie case proven on uncorroborated testimony); Henderson v. State, 403 So. 2d 139, 141 (Miss. 1981) (mistrial granted where prosecution impeached coindictee with highly prejudicial facts concerning coindictee's prior conviction in severed trial); Lee v. State, 403 So. 2d 132, 134 (Miss. 1981) (voluntary intoxication not defense to specific intent offenses); Rufus v. State, 402 So. 2d 874, 875-76 (Miss. 1981) (harsher sentence imposed upon withdrawal of guilty plea); Tolbert v. State, 402 So. 2d 871, 873 (Miss. 1981) (defendant's request for special venire on eve of trial properly denied); Richardson v. State, 402 So. 2d 848, 852 (Miss. 1981) (failure to instruct jury not to draw unfavorable inference not reversible error); Tubbs v. State, 402 So. 2d 830, 836 (Miss. 1981) (court's failure to provide funds for defendant's fingerprint expert not reversible error when other evidence sufficient); Carter v. State, 402 So. 2d 817, 821 (Miss. 1981) (error by court or state forcing defendant to move for mistrial may form basis of double jeopardy claim); Harbin v. State, 402 So. 2d 360, 361-62 (Miss. 1981) (evidence that defendants moved car three feet sufficient to constitute grand larceny); Chambers v. State, 402 So. 2d 344, 345-47 (Miss. 1981) (admission of victim's testimony identifying defendant in one-man showup); Shelby v. State, 402 So. 2d 338, 340-41 (Miss. 1981) (motion for new trial based on new evidence denied where evidence would not produce different results on retrial); Mitchell v. State, 402 So. 2d 329, 330-32 (Miss. 1981) (conviction for acting as real estate broker without license); Henderson v. State, 402 So. 2d 325, 328 (Miss. 1981) (probable cause to search automobile apart from plain view doctrine and automobile inventory); Parker v. State, 401 So. 2d 1282, 1286 (Miss. 1981) (self-defense instruction denied for shooting into occupied building); Hughes v. State, 401 So. 2d 1100, 1105 (Miss. 1981) (separate prosecu-

I. PROBABLE CAUSE

A. *No Requirement of Permanent Record Showing Probable Cause for Issuance of Warrant*

A new development in Mississippi's law of criminal procedure oc-

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tions for kidnapping and rape not double jeopardy); Pierce v. State, 401 So. 2d 730, 732-33 (Miss. 1981) (tape recording by defendant held admissible to impeach); Cowan v. State, 399 So. 2d 1346, 1350 (Miss. 1981) (opinion testimony of defendant's investigator as to how accident occurred excluded); Holden v. State, 399 So. 2d 1343, 1345 (Miss. 1981) (testimony by defendant's ex-wife as to nonconfidential information admitted); Miller v. State, 399 So. 2d 1338, 1341 (Miss. 1981) (single photograph pretrial identification reliable and admissible); State v. Black, 399 So. 2d 1331, 1332 (Miss. 1981) (incorrect indictment in embezzlement charge); Annaratone v. State, 399 So. 2d 825, 826 (Miss. 1981) (defendant's mental capacity for rape a factual issue); Taylor v. State, 398 So. 2d 1341, 1342 (Miss. 1981) (evidence of similar crime admissible to show identity, motive, and intent); May v. State, 398 So. 2d 1331, 1340 (Miss. 1981) (legislative intent to provide alternative sentencing of minors under special circumstances; judge improperly denied defendant opportunity to introduce evidence of alternatives); Jones v. State, 398 So. 2d 1312, 1314 (Miss. 1981) (in criminal case double jeopardy attaches when jury sworn); Aldridge v. State, 398 So. 2d 1308, 1309 (Miss. 1981) (conviction of parents for felonious abuse and battery of infant); Dunaway v. State, 398 So. 2d 658, 659 (Miss. 1981) (payment of traffic fine by defendant not double jeopardy bar to subsequent manslaughter prosecution); Clark v. State, 398 So. 2d 229, 230 (Miss. 1981) (elements of dying declaration exception to hearsay rule); Florence v. State, 397 So. 2d 1105, 1107-08 (Miss. 1981) (probable cause; inventory contemporaneous with impounding of automobile); Alt v. City of Biloxi, 397 So. 2d 897, 901 (Miss. 1981) (cases originating in municipal court appealable to county court and circuit court, but appealable to supreme court only when constitutional issue involved); Anderson v. State, 397 So. 2d 81, 83 (Miss. 1981) (warrantless search of automobile upheld as incident to lawful arrest); Carroll v. State, 396 So. 2d 1033, 1035 (Miss. 1981) (sufficiency of circumstantial evidence); Minor v. State, 396 So. 2d 1031, 1033 (Miss. 1981) (defendant's failure to secure ruling on bifurcated trial held a waiver); Baker v. State, 396 So. 2d 1021, 1022-23 (Miss. 1981) (defendant's "pigeon dropping" scheme to bilk aged woman held grand larceny); Bracy v. State, 396 So. 2d 632, 636 (Miss. 1981) (refusal to make entire arrest report available not error where no effect on outcome of trial); Steed v. State, 396 So. 2d 625, 627 (Miss. 1981) (accused's threats, although not communicated to victim, admissible to show criminal intent); Gallion v. State, 396 So. 2d 621, 622-25 (Miss. 1981) (harmless error to allow prosecution to call witnesses not disclosed to defendant prior to trial since court allowed defendant opportunity to interview witnesses prior to testimony); Taylor v. State, 396 So. 2d 39, 42 (Miss. 1981) (conduct in private home not disturbing peace); Dycus v. State, 396 So. 2d 23, 28-29 (Miss. 1981) (distinction between marital communications privilege and spousal incompetency); Loeffler v. State, 396 So. 2d 18, 18 (Miss. 1981) (admitting evidence that defendant was charged with another offense reversible error); Valentine v. State, 396 So. 2d 15, 17 (Miss. 1981) (cross-examination allowed on any material matter bearing on witness's credibility); Smith v. State, 394 So. 2d 1367, 1369 (Miss. 1981) (statements properly obtained based on *Miranda* warning); Smith v. State, 394 So. 2d 1340, 1341 (Miss. 1981) (indictment lacking only month and date of filing not deficient); Stewart v. State, 394 So. 2d 1337, 1339 (Miss. 1981) (judicial notice of mortality tables); Moore v.

curred in the case of *Wilborn v. State*,[2] in which the Mississippi Supreme Court upheld the issuance of a search warrant[3] on the basis of an admittedly insufficient affidavit and of sworn, unrecorded oral testimony by police officers.[4]

State, 394 So. 2d 1336, 1337 (Miss. 1981) (denial of withdrawal of guilty plea not abuse of discretion); Watts v. Lucas, 394 So. 2d 903, 904 (Miss. 1981) (court looks to substance of post-conviction remedy petition rather than title); Smith v. State, 394 So. 2d 883, 886-87 (Miss. 1981) (leading and suggestive questions by prosecution on redirect based on hearsay testimony introduced by defendant on cross-examination improper but not prejudicial error); Tribbett v. State, 394 So. 2d 878, 882 (Miss. 1981) (refusal to submit entrapment issue to jury proper when no prima facie case established); Banks v. State, 394 So. 2d 875, 878 (Miss. 1981) (reinstruction of jurors unable to reach verdict not abuse of discretion); Saxton v. State, 394 So. 2d 871, 875 (Miss. 1981) (right to speedy trial not impaired absent showing of bad faith delay by state); Catchings v. State, 394 So. 2d 869, 870 (Miss. 1981) (failure to instruct jury to consider uncorroborated testimony of accomplice with care and caution constituted error); Johnson v. State, 394 So. 2d 319, 320 (Miss. 1981) (petition for writ of habeas corpus must be filed with court last entertaining proceedings on which petitioner seeks relief); Brown v. State, 394 So. 2d 316, 318 (Miss. 1981) (failure of Canadian officers to advise defendant of *Miranda* rights did not preclude admission of his statement); Matthew v. State, 394 So. 2d 304, 309 (Miss. 1981) (waiver of right to attorney may occur anytime before or during trial); Edge v. State, 393 So. 2d 1337, 1342 (Miss. 1981) (denial of recess held denial of effective assistance of counsel); Massey v. State, 393 So. 2d 472, 474-75 (Miss. 1981) (evidence of prior conduct held inadmissible to show motive for rape); Fornett v. State, 392 So. 2d 1154, 1155-56 (Miss. 1981) (*Miranda* exception in general-on-the-scene investigation); Beard v. State, 392 So. 2d 1143, 1144-45 (Miss. 1981) (refusal to accept guilty plea from defendant maintaining innocence not error); Hollingsworth v. State, 392 So. 2d 515, 518 (Miss. 1981) (possession of marijuana and paraphernalia in automobile insufficient to show intent to deliver).

[2] 394 So. 2d 1355 (Miss. 1981).

[3] *Id.* at 1357. U.S. CONST. amend. IV provides, "[N]o warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Most courts hold that probable cause exists when the facts and circumstances in a given situation are sufficient to warrant a man of reasonable caution to believe that seizable objects are located at the place to be searched. Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Carroll v. United States, 267 U.S. 132, 160-62 (1924).

The warrant requirement, along with the exclusionary rules, prohibits the use of evidence obtained in a governmental search or seizure in the absence of probable cause for such governmental action. Mapp v. Ohio, 367 U.S. 643, 659-60 (1961); Weeks v. United States, 232 U.S. 383, 398-99 (1914). *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE 85-133 (1980) (law of search and seizure and search warrant requirements); Herman, *Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit*, 36 OHIO ST. L.J. 721, 721-60 (1975) (examining affidavits for search and arrest warrants); LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L. FOR. 1, 1-68 (information from informant constituting probable cause).

[4] 394 So. 2d at 1357. FED. R. CRIM. P. 41(c) provides in pertinent part:

The 1966 case of *Walker v. State*[5] concerned a defendant found guilty of possession of intoxicating liquor.[6] In reversing the defendant's conviction, the court ruled that the fourth amendment requirement of probable cause for the issuance of a search warrant had not been satisfied because the warrant, as well as the affidavit, failed to specify any underlying facts or circumstances upon which a judicial determination of probable cause could be made.[7] Furthermore, the majority added

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(1) *Warrant upon affidavit.* A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit . . . sworn to before the . . . magistrate or state judge and establishing the grounds for issuing the warrant . . . . [T]he federal magistrate . . . may examine under oath the affiant . . . provided that such proceeding shall be taken down by a court reporter or recording equipment . . . .

(2) *Warrant upon oral testimony.*

(A) *General rule.* If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony . . . .

. . . .

(D) *Recording and certification of testimony* . . . . If a voice recording device is available, the Federal magistrate shall record by such means . . . . Otherwise, a stenographic or longhand verbatim record shall be made.

Many states, at one time or another, apparently would not allow a warrant to be issued on anything other than the affidavit or complaint itself. Commonwealth v. Monosson, 351 Mass. 327, 221 N.E.2d 220, 221 (1966); State v. Melendy, 49 Or. App. 441, 619 P.2d 952, 954 (1980); Commonwealth v. Stamps, 427 A.2d 141, 143 (Pa. 1981).

Some states, like the federal government, have a requirement, independent of the United States Constitution, that the basis for issuance of a warrant be recorded in writing. State v. Robertson, 111 Ariz. 427, 531 P.2d 1134, 1135-36 (1975); Cockrell v. State, 256 Ark. 19, 505 S.W.2d 204, 206 (1974); Theodor v. Superior Court, 8 Cal. 3d 77, 501 P.2d 234, 241, 104 Cal. Rptr. 226 (1972); People v. Brethauer, 174 Colo. 29, 482 P.2d 369, 374 (1971); State v. Cadigan, 249 A.2d 750, 759 (Me. 1969); State v. Jasso, 21 Utah 2d 24, 439 P.2d 844, 844 (1968); Glodowski v. State, 196 Wis. 265, 220 N.W. 227, 230 (1928).

This requirement assures certainty of compliance with the constitutional requirement of probable cause, establishes upon the record the facts upon which the magistrate made his determination without subjecting him to the inconvenience of being called to account as a witness, and permits orderly review of the action. State v. Cadigan, 249 A.2d at 759.

[5] 192 So. 2d 270 (Miss. 1966).

[6] *Id.* at 271.

[7] *Id.* at 273. Both the affidavit and the warrant set forth nothing more than the mere conclusion of the affiant, founded upon what he considered to be credible information. *Id.; see also* Spinelli v. United States, 393 U.S. 410, 415-17 (1969) (failure to show probable cause); Aguilar v. Texas, 378 U.S. 108, 110-15 (1964) (same). *Compare* Giordenello v. United States, 357 U.S. 480, 486 (1958) (affidavit reciting no more than elements of crime charged held defective) *with* Jaben v. United States, 381 U.S. 214, 225 (1965) (affidavit sufficient to show probable cause of tax evasion where agent stated that he interviewed third persons with whom taxpayer did business, consulted records reflect-

that a defective affidavit could not be cured by language in the warrant establishing that the justice of the peace had heard and considered oral evidence in support of the affidavit.[8]

Subsequently, in *Prueitt v. State*,[9] the court indicated in dictum that oral testimony could supplement an affidavit offered to gain issuance of a warrant.[10] In *Prueitt*, the defendant was convicted of grand larceny, after a search of his premises revealed stolen property.[11] The defendant alleged that the arresting officers had produced insufficient evidence for the judge to find probable cause to issue a search warrant.[12] Although concluding that the affidavit was sufficient in itself to show probable cause, the court noted that the oral testimony might additionally be considered.[13]

In *Wilborn*,[14] however, the court apparently allowed the issuance of a search warrant on the basis of sworn but unrecorded oral testimony of the officer alone[15] since the affidavit merely stated conclusions of law.[16] Chief Justice Patterson dissented on the ground that the majority mistakenly relied upon *Prueitt*, since *Prueitt* was applicable only to those cases in which the affidavit contained at least some of the underlying facts tending to show probable cause.[17] Additionally, Chief

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ing taxpayer's income, and interviewed third persons with knowledge of taxpayer's financial situation).

[8] 192 So. 2d at 273.

[9] 261 So. 2d 119 (Miss. 1972).

[10] Some federal courts, before the enactment of rule 41 of the Federal Rules of Criminal Procedure, permitted sworn, unrecorded oral testimony to supplement an affidavit. United States *ex rel.* Gaugler v. Brierley, 477 F.2d 516, 525 (3d Cir. 1973); Frazier v. Roberts, 441 F.2d 1224, 1228-29 (8th Cir. 1971).

[11] 261 So. 2d at 120-21.

[12] *Id.* at 122.

[13] *Id.* at 124.

[14] 394 So. 2d at 1355. The defendant was convicted of unlawfully possessing marijuana with intent to deliver same, and of unlawfully possessing phencyclidine. *Id.*

[15] *Id.* at 1357. The justice court judge supplemented the written affidavit for a search warrant with the affiant officer's testimony under oath. The supreme court allowed consideration of this sworn but unrecorded oral testimony where the affiant officer or the justice court judge could recall the testimony. *Id.; cf.* Christofferson v. Washington, 393 U.S. 1090, 1090-91 (1969) (Brennan, J., dissenting from denial of certiorari) (permanent record of evidentiary basis for issuance of warrant required).

[16] 394 So. 2d at 1358 (Patterson, C.J., dissenting). The affidavit stated that the place to be searched was occupied and controlled by Hal Wilborn and the possession of the thing to be seized violated Miss. Code Ann. § 41-29-139 (1972). 394 So. 2d at 1358 (Patterson, C.J., dissenting).

[17] 394 So. 2d at 1358 (Patterson, C.J., dissenting). Part 5 of the affidavit stated in part: "The facts tending to establish the foregoing grounds for issuance of a search warrant are shown on a sheet headed 'Underlying Facts and Circumstances' which is at-

Justice Patterson construed section 41-29-157 of the Mississippi Code as permitting the issuance of a search warrant only upon a sworn, written affidavit stating sufficient facts to establish probable cause.[18] Furthermore, in light of the recent trend to allow a defendant to challenge sworn statements that comprise probable cause, Chief Justice Patterson recognized a need to establish a permanent record of the facts offered so that the defendant might have an adequate opportunity for review.[19]

The *Wilborn* decision represents an unfortunate attitude towards review of the issuance of warrants. The court's decision to permit judicial officers to consider unrecorded testimony will force the defendant to rely on the memories of others, which may suffer from the passage of time. Additionally, this procedure will tempt unscrupulous officers to fabricate probable cause after the fact.[20] It is hoped that the Mississippi legislature will remedy this problem by adopting rules comparable to rule 41(c) of the Federal Rules of Criminal Procedure.[21]

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tached hereto . . . ." No such sheet, however, was attached to the affidavit. *Id.* (Patterson, C.J., dissenting).

[18] *Id.* at 1359 (Patterson, C.J., dissenting). Chief Justice Patterson quoted in his dissenting opinion the following pertinent part of MISS. CODE ANN. § 41-29-157(a)(2) (Supp. 1980) (emphasis added in Chief Justice Patterson's dissenting opinion): "A search warrant shall issue only for an *affidavit* of a person having knowledge or information of the facts alleged, sworn to before the judge or justice of the peace and *establishing the grounds for issuing* the warrant." 394 So. 2d at 1359 (Patterson, C.J., dissenting).

[19] 394 So. 2d at 1359 (Patterson, C.J., dissenting). Justice Patterson's reliance on § 41-29-157 of the Mississippi Code may have been improper because that statute specifically applies to administrative inspection warrants and search warrants.

[20] The restrictions imposed on the issuance of a warrant by other jurisdictions recognize the inherent problems presented by the absence of a written record. *See* McGinley, *The "Four Corners" Requirement: A Constitutional Prerequisite to Search Warrant Validity,* 31 OKLA. L. REV. 289, 289-317 (1978). (fourth amendment requires facts underlying finding of probable cause to be recorded at time of warrant issuance); Comment, *Oral Search Warrants: A New Standard of Warrant Availability,* 21 U.C.L.A. L. REV. 691, 691-701 (1974) (advantages and limitations of oral search warrant procedures); *see also* Franks v. Delaware, 438 U.S. 154, 164-72 (1978) (intentional use of false statements); United States v. Martin, 615 F.2d 318, 329 (5th Cir. 1980) (omissions made intentionally or with reckless disregard may also vitiate finding of probable cause); United States v. Luna, 525 F.2d 4, 6 (6th Cir. 1975) (remanded for resolution of conflict between testimony of informants and that of FBI agents), *cert. denied,* 424 U.S. 965 (1976); *cf.* United States v. Astroff, 578 F.2d 133, 135 (5th Cir. 1978) (only misrepresentation of material facts invalidates warrant).

[21] *See supra* note 4.

B. Probable Cause Based on an Informant's Tip

The Mississippi Supreme Court rendered three decisions in 1981 concerning the determination of probable cause when the information relied on by law enforcement officials is based upon an informant's tip. Few areas of fourth amendment law have generated as much imprecision as the determination of the requisite degree of probable cause necessary to uphold a search or arrest when the premise for the search or arrest is supplied by an informant.[22] The principles presently controlling this determination were initially articulated in *Aguilar v. Texas*.[23] In holding the search warrant in *Aguilar* to be defective, the United States Supreme Court developed the threshold requirements for evaluating information supplied by an informant: "[T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' "[24] The first prong of the *Aguilar* test concerns the informant's *basis of knowledge;* the second prong concerns the informant's *veracity*.[25]

The informant's veracity may be established by his conveying reliable information or by his own personal credibility. The reliability spur seems to relate to the trustworthiness of the information on the particular occasion when it is given.[26] The credibility spur, on the other

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[22] *See* LaFave, *supra* note 3, at 2 (noting conflicting decisions and uncertainty in this area); Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741, 741 (1974) (labelling this area of the law "intimidating").

[23] 378 U.S. 108 (1964). A judge was confronted with an application for a search warrant accompanied by an affidavit that stated: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." *Id.* at 109.

[24] *Id.* at 114-15. The quoted passage in the text is generally referred to as "*Aguilar*'s two-pronged test." Spinelli v. United States, 393 U.S. 410, 413 (1969).

[25] In his excellent law review article on informants and probable cause, Judge Moylan further refined the vocabulary of *Aguilar*'s test by labelling distinct parts of the veracity prong. Judge Moylan's outline significantly aids in understanding *Aguilar*:

The *Trustworthiness* of Hearsay
I. The *Basis of Knowledge* Prong
II. The *Veracity* Prong
A. The *Credibility* Spur
B. The *Reliability* Spur

Moylan, *supra* note 22, at 755.

[26] *Id.* at 757-58. An admission against penal interest is often utilized by courts to establish the reliability spur. *See, e.g.*, United States v. Harris, 403 U.S. 573, 583-84 (1971) (informant's statements that he illegally purchased whiskey sufficiently estab-

hand, apparently relates to the informant's "inherent and ongoing character as a person."[27] To establish an informant's credibility, law enforcement officials and judges often point to the informant's "track record," that is, the record of his past performance.[28]

Although *either* the credibility spur *or* the reliability spur may satisfy the veracity prong, the first prong, the basis of knowledge, must be satisfied to establish fully the informant's trustworthiness.[29] The basis of knowledge prong pertains not to the informant's propensity for truthfulness or lying, but to the facts on which the informant based his conclusions for the supplied information.[30] In *Spinelli v. United*

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lished his veracity); Schramm v. State, 366 A.2d 1185, 1190 (Del. 1976) (informant's criminal involvement may be indicative of ability to convey reliable information). *See generally* LaFave, *supra* note 3, at 23-35 (discussion of use of admission against interest).

[27] Moylan, *supra* note 22, at 757.

[28] *See* McCray v. Illinois, 386 U.S. 300, 303-04 (1967) (upholding arrest where police officer testified that informant was used on 35-40 previous occasions that led to numerous arrests and convictions). In United States v. Harris, 403 U.S. 573 (1971), Justice Harlan discussed the methods of determining an informant's "track record."

> [T]he agent surely could describe for the magistrate such things as the informer's general background, employment, personal attributes that enable him to observe and relate accurately, position in the community, reputation with others, personal connection with the suspect, any circumstances which suggest the probable absence of any motivation to falsify, the apparent motivation for supplying the information, the presence or absence of a criminal record or association with known criminals, and the like.

Id. at 600 (Harlan, J., dissenting). *See generally* LaFave, *supra* note 3, at 10-23 (analysis of evidence concerning informant's past performance needed to establish credibility).

[29] *See, e.g.*, Spinelli v. United States, 393 U.S. 410, 415-16 (1969) (must give basis of informer's knowledge). Judge Moylan succinctly noted the hazards of misreading *Aguilar*:

> A . . . pitfall for those who read *Aguilar* haphazardly is an intermingling of two dualities—(1) the major and conjunctive duality requiring that *both* the "basis of knowledge" prong *and* the "veracity" prong be satisfied, and (2) the minor and disjunctive duality describing how the "veracity" prong may be satisfied by showing *either* the informant to be "credible" *or* his information to be otherwise "reliable."

Moylan, *supra* note 22, at 756-57.

[30] Moylan, *supra* note 22, at 773. In his concurring opinion in *Spinelli*, Justice White cogently explained the basis of knowledge prong:

> [D]id the information come from observation, or did the informant in turn receive it from another? Absent additional facts for believing the informant's report, his assertion stands no better than the oath of the officer to the same effect. Indeed, if the affidavit of an officer, known by the magistrate to be honest and experienced, stating that gambling equipment is located in a certain building is unacceptable, it would be quixotic if a similar statement from an honest informant were found to furnish probable cause.

States,[31] the Supreme Court elaborated on the *Aguilar* requirements and formulated methods of supporting or shoring up weaknesses in either the veracity prong[32] or basis of knowledge prong.[33]

In *Powell v. State,*[34] the Mississippi Supreme Court confronted a challenge to a seizure based on information conveyed by two informants to law enforcement officers. During an investigation of a burglary of a shoe store, the informants supplied information implicating the defendant.[35] On the day following the conversations with the two

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393 U.S. 410, 424 (1969).

[31] 393 U.S. 410 (1969). The affidavit in support of the search warrant contained the following: (1) a record of Spinelli's movements for five days during a single month; (2) the specific numbers of two telephones at an apartment entered into by Spinelli during those five days; (3) the assertion that Spinelli was "known" to law enforcement officials to be a "bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers;" and (4) information from a confidential reliable informant that Spinelli was "operating a hand book and accepting and disseminating wagering information," using the telephones described above. *Id.* at 420-22. The Court concluded, inter alia, that the allegations set forth in items (1) and (2) reflected "innocent-seeming activity and data," *id.* at 414, that the allegation in (3) was a "bald and unilluminating assertion of suspicion that [was] entitled to no weight in appraising the magistrate's decision," *id.*, and that the allegation in item (4) had a "fundamental place" in the warrant application. *Id.*

[32] If information *about* the informant, the credibility spur, or information *from* the informant, the reliability spur, is insufficient to satisfy the veracity prong, then the *independent observations* of the affiant officers might be considered to verify or to corroborate the informant's tip. *Id.* at 415-16.

[33] If the informant was unable to state that he witnessed firsthand the incriminating facts, then a recitation of the facts in *sufficient detail* may suffice. Specifically, the Court explained the "self-verifying detail:"

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.
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> The detail provided by the informant in *Draper v. United States,* 358 U.S. 307 (1959), provides a suitable benchmark. While . . . the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return . . . by train with three ounces of heroin on one of two specified mornings. Moreover, [the informer] went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival . . . . A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way.

393 U.S. at 416-17.

[34] 394 So. 2d 326 (Miss. 1981).

[35] *Id.* at 327. The first informant told an officer that he had seen the defendant with "some boots" and that the defendant had attempted to give him a pair. A second, un-

informants, the officer took the defendant to the police station for questioning.[36]

At trial, the officer who talked with the informants testified that he did not question the unidentified informant about his knowledge of the defendant's involvement "due to the fact that he (the informant) was a close friend of [defendant] and I just took his word."[37] Furthermore, the officer testified that "I just took it as though he knew what he was talking about."[38]

The Mississippi Supreme Court concluded that the officer had probable cause to detain and to question the defendant.[39] The court then addressed the issue of the informants' trustworthiness:

> No suggestion was made that the informants were not reliable, both were friends or acquaintances of the defendant, had been observed upon several occasions in conversation with the defendant in the neighborhood in which they lived. It is manifest [that the officer] did in fact consider the informants reliable. They each imparted sufficient information to warrant [the officer] in detaining the defendant and questioning him. It was reasonable, proper and lawful for [the officer] to conduct himself as he did.[40]

The court's opinion was devoid of any *Aguilar* or *Spinelli* analysis. The conclusions of the informants were accepted at face value by the officer. Had the officer approached a magistrate with only the information the officer possessed when he detained the defendant, the magistrate would have refused to issue a warrant.[41]

The court's opinion in *Powell* reflects a common problem encoun-

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identified informant told the officer that the defendant should be investigated since, according to the second informant, the defendant had "those boots." The officer testified that he knew the first informant to be a friend of the defendant's. *Id.*

[36] *Id.* The officer testified: "[T]he next day after [talking with the informants] I was looking for [the defendant], and it just so happened I ran into him on Horton Drive as I was leaving my house from dinner. I picked him up and advised him I wanted to talk with him . . . ." *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 328.

[40] *Id.*

[41] Justice White addressed this issue in his concurring opinion in *Spinelli*: "[I]f the affidavit of an officer, known by the magistrate to be honest and experienced, stating that gambling equipment is located in a certain building is unacceptable, it would be quixotic if a similar statement from an honest informant were found to furnish probable cause." 393 U.S. at 424.

tered in analyzing *Aguilar* and *Spinelli*. Reliance on the informant's "reliability" *alone* does not satisfy the requirements of *Aguilar*.[42]

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[42] Judge Moylan has considered this problem to be the cause of a substantial amount of perplexity in this area:

> A great deal of unnecessary confusion has resulted from the careless linguistic habits of the opinions which refer to *Aguilar*—from what Justice Frankfurter referred to as the "use [of] language not with fastidious precision." The fault lies in the indiscriminate overuse of the adjective "reliable" and its variant forms. . . .
>
> The case law is strewn with the random employment of the word "reliability" to connote the overall subject of the outline itself and every one of its constituent parts. There is frequently no consistency in usage within a single opinion, let alone between opinions and between courts. As a result, to use one opinion's "reliability" analysis as authority to solve another case's "reliability" problem is all too often to compare apples with oranges. We should never use a portmanteau word unless we are careful to designate which of its various connotations we have in mind on a particular occasion.

Moylan, *supra* note 22, at 754-56.

Two other opinions concerning probable cause and informants were handed down by the Mississippi Supreme Court in 1981. In Mosley v. State, 396 So. 2d 1015 (Miss. 1981), the defendant was arrested for possession of marijuana following a search of her house. A search warrant had been secured that set forth the following information as supporting probable cause:

> (a) Police had received numerous complaints from area residents of appellant's drug activity in the house to be searched;
>
> (b) Police had personal knowledge appellant resided in the house;
>
> (c) Appellant had been previously arrested for and pled guilty to charges of unlawful possession of marijuana;
>
> (d) Known drug traffickers were seen entering and leaving the premises; and
>
> (e) A confidential informant had made two (2) prior controlled purchases of marijuana from appellant.

Id. at 1017. Additionally, the issuing judge received sworn oral statements setting forth other facts. *Id.* The Mississippi Supreme Court concluded that the search warrant was supported by probable cause. *Id.* at 1018.

Although the existence of probable cause in *Mosley* may arguably be debated, the evidence, when viewed as a whole, supports the court's decision. In further support of the decision in *Mosley* is language from United States v. Ventresca, 380 U.S. 102 (1965), where the United States Supreme Court stated that, "although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Id.* at 109.

In Tucker v. State, 403 So. 2d 1274 (Miss. 1981), the Mississippi Supreme Court held that the following information in an affidavit met the requirements of *Aguilar* in issuance of a search warrant for a motel room.

> On Feb. 9, 1980 [Officer] Charley McVey received information from a reliable informer who has given Charley information in the past that has lead [sic] to convictions. His information was that a black male named Tucker who was

II. Right to a Speedy Trial

Another significant decision rendered in the area of criminal procedure in 1981 involved the interpretation of section 99-17-1[43] of the Mississippi Code, dealing with a defendant's right to a speedy trial. In *Carlisle v. State*,[44] the Mississippi Supreme Court held that if a mistrial results, or if a case is reversed on appeal and a retrial follows, within the statutory time period, compliance with section 99-17-1 is satisfied.[45]

In 1972 the United States Supreme Court, in *Barker v. Wingo*,[46] recognized that, since the right to a speedy trial[47] is a necessarily vague concept, it is difficult to determine with precision when the right has been denied.[48] The Court identified four factors that courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial: the length of the delay, the reason for the delay, the defendant's timely assertion of the right, and the resulting prejudice to the defendant.[49] The Court added that the individual

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driving a [sic] Olds car with Missouri tags . . . was dealing drugs out of this car . . . .

This car was stopped . . . [and] several hand rolled cig. were found in the car . . . . The Passenger had two small bags of green veg. matter and the driver had several small foil pouches of white [substance] that . . . came out positive for cocaine.

The two [men] that had contraband on them are staying in room #162 Best Western Motel Hwy 82 Starkville, Miss.

The informer also told [the officer] that Tucker had several pounds of marijuana.

Id. at 1276. The past "track record" of the informant satisfied the credibility spur of the veracity prong and the recitation of facts in some detail supplied the required basis of knowledge requirement. *See supra* note 25.

[43] Miss. Code Ann. § 99-17-1 (Supp. 1981) provides: "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned."

[44] 393 So. 2d 1312 (Miss. 1981).

[45] *Id.* at 1314; *cf.* Payne v. State, 363 So. 2d 278, 279 (Miss. 1978) (dismissal under § 99-17-1 due to delay exceeding 270 days).

[46] 407 U.S. 514 (1972).

[47] The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI. The Court's opinion in Klopfer v. North Carolina, 386 U.S. 213, 223 (1967), established that the right to a speedy trial was imposed on the states by the due process clause of the fourteenth amendment.

[48] 407 U.S. at 521.

[49] *Id.* at 530. In practice, however, it is rare for a defendant to obtain a dismissal under the sixth amendment for delays of less than one year, particularly defendants who

states were free to prescribe a reasonable time period consistent with the above constitutional standards.[50]

There are three positions taken by states with reference to the effect of a mistrial on speedy trial statutes. In some jurisdictions, a mistrial occurring within the prescribed time has no effect and the defendant must again be brought to trial within the speedy trial statute period.[51] Other jurisdictions have taken the position that under such statutes, a mistrial constitutes a trial and, therefore, the statutory period begins to run anew.[52] Another line of decisions reasons that, when a mistrial results, the statute has been complied with and the time for retrial is discretionary with the courts.[53]

In *Carlisle,* the defendant had been brought to trial three times for murder. In the three trials, the defendant was convicted, granted a mistrial, and, in the third trial, convicted again.[54] The Mississippi Supreme Court reversed the last conviction.[55] The defendant's fourth trial commenced 475 days after the mandate of the supreme court was filed.[56] The court ruled that the Mississippi speedy trial provision had been complied with and that the time for retrial was a matter of discretion for the trial judge, to be measured by the *Barker* standards.[57] The court noted that, while there was a long delay, most of the delay was brought about by continuances,[58] the defendant's failure to

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are not being held in pretrial custody. Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts,* 1975 U. ILL. L. FOR. 11, 15-18. *See generally* Note, *The Right to a Speedy Trial,* 20 STAN. L. REV. 476, 477-82 (1968) (factors involved in speedy trial determination).

[50] 407 U.S. at 523. *See generally* Note, *The Right to a Speedy Criminal Trial,* 57 COLUM. L. REV. 846, 863-64 (1957) (evaluation of statutory time requirements).

[51] Rider v. State, 103 Ga. App. 184, 118 S.E.2d 749, 750 (1961).

[52] People v. Pierson, 149 Cal. App. 2d 151, 307 P.2d 994, 999 (1957); People v. Wade, 62 Ill. App. 2d 481, 210 N.E.2d 791, 791 (1965).

[53] Ruester v. Turner, 250 So. 2d 264, 267 (Fla. 1971); People v. Eickert, 124 Ill. App. 2d 394, 260 N.E.2d 465, 467 (1970); State v. Fromkin, 174 Neb. 849, 120 N.W.2d 25, 30 (1963).

[54] 393 So. 2d at 1313.

[55] Carlisle v. State, 348 So. 2d 765 (Miss. 1977). The lower court's decision was reversed since a witness who had testified for the defendant in relating that self-defense was the cause of the killing was impeached by his prior statement of knowledge of the defendant's plan to kill the victim. *Id.* at 766-67.

[56] 393 So. 2d at 1314.

[57] *Id.* at 1314-15.

[58] *Id.* Many courts will allow the time for a speedy trial to be extended in the case of illness or incapacity on the part of the judge, the prosecutor, or key prosecution witnesses. *See generally* Annot., 78 A.L.R. 3d 297 (1977) (analysis of cases on this issue). It is considered improper, however, for the prosecution intentionally to delay in order to gain a tactical advantage or to harass a defendant. United States v. Marion, 404 U.S.

promptly assert his right to a speedy trial,[59] and the defendant's failure to allege any prejudice arising from the trial delay.[60] Thus, the court held that the defendant was not denied her right to a speedy trial.[61]

The *Carlisle* decision, therefore, limits the application of section 99-17-1 and thereby places more emphasis on the public's desire to obtain a criminal conviction. But, since *Barker* protects a defendant where section 99-17-1 does not, the defendant is still provided adequate consideration of his right to a speedy trial.

III. Right to a Trial by Jury under Habitual Criminal Statutes

In 1976 the state legislature enacted Mississippi's habitual criminal statutes.[62] The Uniform Criminal Rules of Circuit Court Practice

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307, 325-26 (1971); Pollard v. United States, 352 U.S. 354, 361 (1957); *see also* State v. Sistrunk, 404 So. 2d 564, 565 (Miss. 1981) (continuances granted to prosecution absent protest or objection by defendant will be subtracted from time period between indictment and trial).

[59] 393 So. 2d at 1315. In *Barker* the United States Supreme Court specifically rejected a rule that would require the defendant to demand a speedy trial or forever waive his right. Instead, failure to assert his right should be considered along with other factors. 407 U.S. at 528; *see* Bandy v. United States, 408 F.2d 518, 522 (8th Cir.) (purposeful delay may overcome a failure to demand), *cert. denied*, 396 U.S. 890 (1969); Moser v. United States, 381 F.2d 363, 364 (9th Cir. 1967) (despite failure to demand, court balanced other considerations), *cert. denied*, 389 U.S. 1054 (1968).

[60] 393 So. 2d at 1315. The United States Supreme Court has provided an enumeration of interests to be considered in determining whether a defendant's right to a speedy trial has been prejudiced: to prevent oppressive pretrial incarceration, to minimize anxiety and concern of the accused, and most importantly, to limit the possibility that the defense will be impaired. United States v. MacDonald, 435 U.S. 850, 858 (1978); Barker v. Wingo, 407 U.S. 514, 532 (1977); *see also,* Klopfer v. North Carolina, 386 U.S. 213, 221-22 (1967) (trial delays may subject defendant to public scorn and fewer employment opportunities).

[61] 393 So. 2d at 1315.

[62] Act of May 25, 1976, ch. 470 §§ 1-2, 1976 Miss. Laws 772-73 (codified at Miss. Code Ann. §§ 99-19-81 to -83 (Supp. 1981)). Miss. Code Ann. § 99-19-81 (Supp. 1981) provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Miss. Code Ann. § 99-19-83 (Supp. 1981) provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately

were adopted by the Mississippi Supreme Court in 1979. Sections 99-19-81 and 99-19-83 of the Mississippi Code and rule 6.04 of the Uniform Criminal Rules[63] determine the procedure for convicting and sentencing habitual criminals.[64] The Mississippi Supreme Court in 1981 continued its interpretation of this procedure.[65]

The most consequential case rendered by the court in 1981 pertaining to habitual criminals was *Wilson v. State*,[66] where the defendant was convicted of aggravated assault and mandatorily sentenced, pursuant to section 99-19-83 of the Mississippi Code,[67] to life imprisonment.[68] On appeal, the defendant contended that he was unconstitu-

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brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

[63] MISS. UNIF. CRIM. R. CIR. CT. P. 6.04 provides:

In cases involving enhanced punishment for subsequent offenses under the Habitual Criminal Statute, MISS. CODE ANN. § 99-19-83 (Supp. 1981):

(1) The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous felonies, the state or federal jurisdiction of previous conviction, and the date of judgment. The indictment shall not be read to the jury.

(2) Separate trials shall be held on the principal charge and on the charge of previous convictions. In the trial on the principal charge, the previous conviction will not be mentioned by the state or the court except for impeachment purposes.

(3) If the defendant is convicted on the principal charge, a hearing before the court will then be conducted on the previous convictions.

[64] For a background discussion of the Mississippi habitual criminal statutes, see *1980 Mississippi Supreme Court Review*, 51 MISS. L.J. 389, 476-86 (1980).

[65] Cases construing the habitual criminal statutes that will not be discussed textually are: Ard v. State, 403 So. 2d 875, 876 (Miss. 1981) (indictment that cited, "[A]nd the said Billy Ard was convicted in . . . Mississippi, of another felony, same being Cause No. 218" held insufficient under § 99-19-81); Diddlemeyer v. State, 398 So. 2d 1343, 1346-47 (Miss. 1981) (defendant correctly charged under indictment as habitual criminal); Yates v. State, 396 So. 2d 629, 631 (Miss. 1981) (sentencing under § 99-19-83 improper where defendant did not serve separate terms); Baker v. State, 394 So. 2d 1376, 1378-79 (Miss. 1981) (habitual criminal statutes not violative of constitutional prohibition against cruel and inhuman punishment).

A profitable comparison may be made between the indictments set forth in the Mississippi Supreme Court's opinions in *Ard* and *Diddlemeyer*.

[66] 395 So. 2d 957 (Miss. 1981).

[67] *See supra* note 62.

[68] 395 So. 2d at 958. The trial court had determined that the defendant was not entitled to a jury trial on the issue of previous convictions. *Id.* at 959-60.

tionally denied a jury trial on the issue of his two prior felony convictions.[69] Noting that this was a question of first impression, the Mississippi Supreme Court rejected the defendant's argument.[70] The court reasoned that, by enacting the habitual criminal statutes, the legislature intended that the trial court, rather than the jury, would determine the existence of prior convictions.[71] Furthermore, the court noted that the individual states are allowed great discretion in developing their own procedure for convicting and sentencing habitual criminals.[72] Also, recognizing that the issue of prior convictions is determined at a second stage in the trial process, the court stated that the defendant must be afforded certain rights during this second stage, including "ample opportunity to dispute the truth of the assertion made by the state," the "right to be confronted with witnesses and cross-examine them," and the "right to secure the presence of witnesses by process of court."[73]

Jurisdictions are divided over the issue decided by the Mississippi Supreme Court in *Wilson*. Some states, by statute, require a trial by jury on the question of prior convictions.[74] Where state statutes are

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[69] *Id.* at 958, 960.

[70] *Id.* at 960.

[71] *Id.* at 960-61. The court explained that the title of § 99-19-83—"Sentencing of habitual criminals to life imprisonment"—"indicat[ed] legislative intent was negative as to a jury trial in applying the statute." 395 So. 2d at 960-61. The court further noted that sentencing is primarily a function of the judge. *Id.* at 961.

The court cited Usry v. State, 378 So. 2d 635 (Miss. 1979), as foreshadowing the holding in *Wilson*. The procedure followed in *Usry* occurred in two stages:

> The defendants were first tried before a jury on the principal charge of burglary. After a verdict was returned by the jury finding the defendants guilty of burglary, the court conducted a hearing without a jury, after overruling defendant's motion for a jury trial, with reference to the defendants' prior convictions and whether enhanced punishment was mandated under Mississippi Code Annotated section 99-19-81.

378 So. 2d at 638 (footnote omitted). The *Wilson* court concluded that the rationale in *Usry* pertaining to § 99-19-81 was "analogous" to § 99-19-83. 395 So. 2d at 960 n.1.

[72] 395 So. 2d at 960. In Spencer v. Texas, 385 U.S. 554 (1967), cited by the Mississippi Supreme Court in *Wilson*, the United States Supreme Court declared that "[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate" in the area of habitual criminal statutes. 385 U.S. at 566. In noting the procedural distinctions between state statutes, the United States Supreme Court stated, "[t]he method for determining prior convictions varies also between jurisdictions affording a jury trial on this issue . . . and those leaving that question to the court." *Id.* (citations omitted).

[73] 395 So. 2d at 960.

[74] *See, e.g.*, KY. REV. STAT. ANN. § 532.080 (Baldwin 1981) (jury determines status of persistent felony offender); MICH. COMP. LAWS ANN. § 769.13 (Supp. 1981) (jury to deter-

silent on the issue, some state courts conclude that a right to a trial by jury is required.[75] The Mississippi Supreme Court's decision aligning this state with those jurisdictions not requiring a trial by jury on the issue of prior convictions[76] is justified on the basis that during the sentencing process the concept of due process, which encompasses the right to a trial by jury, "does not . . . implicate the entire panoply of criminal trial procedural rights."[77]

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mine allegations of prior convictions); S.D. CODIFIED LAWS ANN. § 22-7-12 (1979) (defendant must be informed of right to trial by jury). *But see, e.g.*, NEB. REV. STAT. § 29-2221(2) (1979) (hearing on issue of prior convictions held before the court alone); NEV. REV. STAT. § 207.010(6) (1979) (court to determine issue of prior convictions).

[75] *See, e.g., In re* Yurko, 10 Cal. 3d 857, 519 P.2d 561, 565, 112 Cal. Rptr. 513, 517 (1974) (en banc) (defendant entitled to trial on prior convictions issue); Swift v. People, 171 Colo. 178, 465 P.2d 391, 393 (1970) (jury determines existence of prior convictions); State v. Ferrone, 96 Conn. 160, 113 A. 452, 457 (1921) (jury to determine prior convictions question).

[76] *See, e.g.*, Mergenthaler v. State, 239 A.2d 635, 639 (Del. 1968) (right to trial by jury does not extend to proceeding to determine existence of previous offenses); Eutsey v. State, 383 So. 2d 219, 224 (Fla. 1980) (defendant not entitled to trial by jury in habitual criminal proceeding to determine prior conviction).

In United States v. Bowdach, 561 F.2d 1160 (5th Cir. 1977), the court of appeals concluded that a right to a trial by jury on the issue of prior convictions was not mandated by 18 U.S.C. § 3575 (1976). 561 F.2d at 1173 n.5, 1174-75.

[77] Gardner v. Florida, 430 U.S. 349, 358 n.9 (1977); *see* United States v. Bowdach, 561 F.2d 1160, 1172-75 (5th Cir. 1977) (discussion of constitutionality of federal habitual criminal statute, 18 U.S.C. § 3575 (1976)); Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356, *passim* (1975) (constitutionality of statutes permitting enhanced punishment for habitual criminals).

INSURANCE

In 1981, the Mississippi Supreme Court decided several cases in the area of insurance law. Three of these cases will be discussed textually; the remainder will be relegated to the footnotes.

I. Payment of a Tortfeasor's Punitive Damages by His Insurance Company

The case of *Anthony v. Frith*[1] addressed the question whether it is against public policy for an insurer to pay punitive damages assessed against its insured in a negligence action.[2] Anthony was injured when she was struck by an automobile driven by Frith, who was intoxicated at the time.[3] State Farm, Frith's insurer, paid the compensatory damages but refused to pay those damages punitive in nature.[4] After a hearing on the issue, the circuit court found that, even though the policy by its terms covered punitive damages,[5] public policy prohibited an insurer from paying punitive damages assessed against its insured.[6]

On appeal, the Mississippi Supreme Court reversed.[7] The court recognized that there is a split of authority among the jurisdictions[8]

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[1] 394 So. 2d 867 (Miss. 1981).

[2] *Id.* at 868.

[3] *Id.* at 867.

[4] *Id.* at 867-68.

[5] *Id.* at 868. The pertinent provision of the policy stated that the company would "pay on behalf of the *insured* all sums which the insured shall become legally obligated to pay as *damages* because of (A) bodily injury sustained by other persons, and . . . caused by accident." *Id.* (emphasis in original).

[6] *Id.* Most insurance policies exclude coverage for damages caused by the insured's intentional acts and such exclusions are normally upheld. *See, e.g.*, Messersmith v. American Fidelity Co., 232 N.Y. 161, 133 N.E. 432, 433 (1921) (opinion by Justice Cardozo stating that the "fundamental principle that no one shall be permitted to take advantage of his own wrong" would prohibit policy from covering intentional torts even if there was no express provision); Harrell v. Traveler's Indem. Co., 279 Or. 199, 567 P.2d 1013, 1021 (1977) (insurer may exclude punitive damages from coverage).

[7] 394 So. 2d at 868.

[8] *Id.*; *see also* 7 J. Appleman, Insurance Law and Practice § 4312 (Supp. 1972) (majority of courts impose liability on insurer for punitive damages assessed against its insured); Annot., 20 A.L.R.3d 343, 347-52 (1968) (showing clear split of authority among jurisdictions on this issue). *Compare* American Sur. Co. v. Gold, 375 F.2d 523, 527-28 (10th Cir. 1966) (against public policy for insurer to pay punitive damages), *and* Nicholson v. American Fire & Casualty Ins. Co., 177 So. 2d 52, 53 (Fla. Dist. Ct. App. 1965) (same), *with* Southern Farm Bureau Casualty Ins. Co. v. Daniel, 246 Ark. 849, 440

and decided that "the better reasoned view" was that public policy does not prevent holding an insurer liable for the punitive damages assessed against its insured in a negligence action.[9]

Although the various jurisdictions are not in agreement as to the purpose of punitive damages, most allow awards of punitive damages in appropriate circumstances.[10] Courts have employed four rationales to support the awarding of punitive damages: (1) punishment and deterrence; (2) public policy; (3) compensation; and (4) revenge.[11] Mississippi courts utilize punitive damages to promote a sense of public justice, as well as to punish and to deter.[12] Jurisdictions that award punitive damages for punishment and deterrence reason that by punishing the defendant for his antisocial conduct, he and other potential tortfeasors will be deterred from committing such acts in the future.[13]

Northwestern National Casualty Co. v. McNulty[14] is the leading case holding that public policy is contravened by requiring an insurance company to pay the punitive damages of its insured.[15] Like *Frith*,

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S.W.2d 582, 584 (1969) (not against public policy for insurer to pay insured's punitive damages), *and* Lazenby v. Universal Under. Ins. Co., 214 Tenn. 639, 383 S.W.2d 1, 5 (1964) (same).

[9] 394 So. 2d at 868.

[10] Only four states, Louisiana, Massachusetts, Nebraska, and Washington, prohibit the award of punitive damages, but they allow certain exceptions to the general prohibition. Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1, 4-5 (1980).

[11] *Id.* at 5-7.

[12] *See* Snowden v. Osborne, 269 So. 2d 858, 860 (Miss. 1972) (punitive damages are reward for bringing wrongdoer to account); West Bros., Inc. v. Barefield, 239 Miss. 530, 542, 124 So. 2d 474, 480 (1960) (punitive damages allowed as punishment and warning to deter tortfeasor and others from committing like offenses in the future); *see also* College Life Ins. Co. v. Byrd, 367 So. 2d 929, 931 (Miss. 1979) (stating in dicta that punitive damages may be awarded for breach of contract under certain conditions); Standard Life Ins. Co. v. Veal, 354 So. 2d 239, 247-48 (Miss. 1977) (allowing punitive damages for unfounded refusal to pay legitimate claim).

[13] Belli, *supra* note 10, at 6. RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) defines punitive damages as those "damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."

Punitive damages differ from compensatory and actual damages in that the latter are "such [damages] as will compensate the injured party for the injury sustained, and nothing more." BLACK'S LAW DICTIONARY 352 (rev. 5th ed. 1979).

Mississippi courts do not allow punitive damages when the defendant was merely negligent; rather, there must be proof of wilful, wanton, or reckless behavior. Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 150-51, 141 So. 2d 226, 233 (1962).

[14] 307 F.2d 432 (5th Cir. 1962).

[15] *See* Comment, *Punitive Damages and The Drunken Driver*, 8 PEPPERDINE L. REV. 117, 153-54 (1980) (providing an exhaustive list of cases and law review articles on

McNulty involved punitive damages assessed against a drunken driver.[16] The Fifth Circuit noted that, under the governing Florida law, punitive damages were allowed only to punish and to deter.[17] Given that restriction, the court then reasoned that, if the tortfeasor "were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose."[18] The tortfeasor would not be punished because he would not pay the punitive damages.[19] The insurance company would be punished temporarily until it could raise its rates to cover the punitive damage award,[20] but the true loser would be the public, upon whom would fall the burden of paying the damages through higher premiums.[21] Therefore, the *McNulty* court held the payment by an insurer of punitive damages assessed against its insured to be violative of public policy.[22]

If *McNulty* had originated in Mississippi, or in a state with similar case law, the Fifth Circuit would have had to reason further before reaching a conclusion. As noted earlier,[23] in addition to using punitive damages to punish and to deter, Mississippi courts also recognize the "public justice" rationale for awarding punitive damages.[24] Under this rationale, "referred to as the 'private attorney general' approach, allowance of punitive damages acts to persuade the injured victim to pursue his claim and also acts to entice counsel to accept the case."[25] Analyz-

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topic of insurance coverage of punitive damages and stating that most commentators have adopted the logic of *McNulty*).

Prior to *McNulty*, only two jurisdictions, Colorado and Connecticut, had held that a tortfeasor could not shift the burden of punitive damages to his insurer. Comment, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 CUM. L. REV. 487, 500-01 (1978); *see* Universal Indem. Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776, 779 (1934) (insurer not liable for punitive damages as matter of contract construction); Tedesco v. Maryland Casualty Co., 127 Conn. 533, 18 A.2d 357, 359 (1941) (same).

[16] 307 F.2d at 433. The defendant was traveling over 80 miles an hour when he hit McNulty, and did not stop to render aid. As a result of the accident, McNulty suffered permanent brain damage. *Id.*

[17] *Id.* at 435.

[18] *Id.* at 440.

[19] *Id.*

[20] *Id.* The court reasoned that since the insurance company had done no wrong, it would be pointless to punish it. *Id.*

[21] *Id.* at 440-41.

[22] *Id.* at 441.

[23] *See supra* note 12 and accompanying text.

[24] *See* Snowden v. Osborne, 269 So. 2d 858, 860 (Miss. 1972) (held one purpose of punitive damages to reward plaintiff for bringing wrongdoer to justice).

[25] Belli, *supra* note 10, at 6; *see also* Yazoo & M.V.R.R. v. Consumers Ice & Power Co., 109 Miss. 43, 48, 67 So. 657, 658 (1915) (attorney's fees may be considered in computing damages where punitive damages appropriate).

ing the *McNulty* case under this theory yields a completely different result from that reached by the Fifth Circuit. By precluding the insurer from paying the punitive portion of a judgment, the court would force the injured party, and his attorney, to look to the tortfeasor alone for punitive damages, out of which the plaintiff could pay his attorney's fees. If the tortfeasor were impecunious, with his sole valuable asset being his insurance policy, not only would the *McNulty* holding fail to encourage the injured party to pursue a valid claim, it would discourage him from doing so.[26]

The Mississippi Supreme Court gave no rationale for its holding in *Frith*, stating only that the "better reasoned view [was] to hold it was not against public policy in this case to require the carrier to pay punitive damages."[27] Nonetheless, the court made a salutary decision. To have held otherwise would produce results inconsistent with Mississippi's policy of rewarding plaintiffs for bringing wrongdoers to justice.[28]

The court's decision, however, may not have a totally desirable effect. There remains the troublesome problem addressed in *McNulty* that insurance rates may rise dramatically as insurance companies scramble to protect themselves from the imposition of future punitive damage awards.[29] It is possible, though, both to encourage injured par-

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[26] Admittedly, the *McNulty* holding is not a deterrent to bringing suit if the defendant has a "deep pocket."

[27] 394 So. 2d at 868.

[28] *See supra* note 12 and accompanying text.

[29] There is nothing, from a judicial standpoint, to prevent insurer from excluding coverage of punitive damages from its policies. Harrell v. Travelers Indem. Co., 279 Or. 199, 567 P.2d 1013, 1015 (1977). It would seem logical for insurers to protect themselves in this manner, but many have not done so, as evidenced by the number of cases in recent years that have held an insurer liable for the punitive damages assessed against its insured. *See, e.g.*, Price v. Hartford Accident & Indem. Co., 108 Ariz. 485, 502 P.2d 522, 524-25 (1972) (rejecting *McNulty*'s logic because of overriding public policy that insurer should be required to honor provisions of policy for which it has accepted premiums); Southern Farm Bureau Casualty Ins. Co. v. Daniel, 246 Ark. 849, 440 S.W.2d 582, 583 (1969) (juries' ability to distinguish between punitive damages and compensatory damages too unpredictable to allow insurance coverage to apply to one type of damage and not to another); Carroway v. Johnson, 245 S.C. 200, 139 S.E.2d 908, 910 (1965) (defendant allowed to shift punitive damages to his insurer because language of policy was ambiguous and reasonable person would have expected policy to cover punitive damages); Lazenby v. Universal Under. Ins. Co., 214 Tenn. 639, 383 S.W.2d 1, 5 (1964) (average policy holder expects to be covered for all nonintentional tort claims); *see also* Comment, *Insurance for Punitive Damages: A Reevaluation*, 28 HASTINGS L.J. 431, 431, 440-46 (1976) (commentators favor not allowing the insurer to pay punitive damages, but more recent trend is toward allowing such payments).

ties and their counsel to bring wrongdoers to trial and to avoid an excessive rise in insurance premiums. This can be accomplished through legislation that limits the amount of punitive damages recoverable in a negligence action,[30] perhaps to an amount equal to the reasonable attorney's fees incurred by the plaintiff.[31]

This legislation would have three effects. First, it would aid in persuading injured parties to bring to court claims involving gross, wanton, or reckless conduct, since the persons injured could expect to be made whole economically. Second, it would entice counsel to accept such cases since they could expect to recover reasonable attorney's fees if victorious. Third, it would encourage settlements. An insurance company defending in a case in which attorney's fees are likely to be awarded would have an incentive to settle early to avoid the needless accumulation of additional fees.

Admittedly insurance rates would still rise if this statute were enacted, but not nearly so radically as they would if the legislature sits idly by and fails to act on this potentially serious problem.

II. Settlement by a Tortfeasor after Notice of Insurance Company's Subrogation Right

Preferred Risk Mutual Insurance Co. v. Courtney[32] presented a novel question to the court: may a third-party tortfeasor with knowledge of an insurer's subrogation claim ignore that claim, settle with the

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[30] Such a statute would have no effect on the plaintiff's ability to recover actual damages. Actual damages are a separate category of damages and would be unaffected by the statute. *See supra* note 13; *see also* Mississippi Power Co. v. Jones, 369 So. 2d 1381, 1386 (Miss. 1979) (punitive damages not awarded to compensate a party for his injury and are not recoverable unless actual damages suffered).

An effective statute might be written as follows:

> (1) Except as provided in subsection (2), punitive damages may be awarded only in cases of intentional misconduct.
>
> (2) If punitive damages are appropriate in the case even though the conduct was not intentional, the trial judge, at his discretion, may allow the plaintiff punitive damages in an amount not greater than his reasonable attorney's fees incurred in bringing the action.

See Craney v. Donovan, 92 Conn. 236, 102 A. 640, 641 (1917) (punitive damages limited to expense of litigation less taxable costs).

The use of attorney's fees as part of, rather than as a limitation on, a punitive damages award has been permitted in Mississippi. In Yazoo & M.V.R.R. v. Consumers Ice & Power Co., 109 Miss. 43, 48, 67 So. 657, 658 (1915), the court stated that it is proper for the jury to consider the probable expenses of litigation in estimating damages in cases where punitive damages are to be awarded.

[31] *See supra* note 30 (suggested punitive damages statute).

[32] 393 So. 2d 1328 (Miss. 1981).

injured party, and be released from all liability?

The pertinent facts were as follows. Courtney had an insurance policy with Preferred under which Preferred was obligated to reimburse Courtney for any medical expenses and loss of income caused by an accident. The policy contained a clause that subrogated Preferred to all rights of recovery that Courtney might have against third parties due to the accident.[33] When Courtney's wife and daughter-in-law were injured in a collision, Preferred paid them $4,525.21. Subsequently, the Courtneys filed a negligence suit against Farris, the driver of the other vehicle in the accident. Prior to a settlement between Farris and the Courtneys, Preferred notified Farris that it was subrogated to the Courtneys' claim.[34] After the settlement, Preferred brought suit against Farris for the medical expenses and lost income payments Preferred had paid to the Courtneys. The trial court sustained Farris' demurrer to the complaint.[35]

The Mississippi Supreme Court affirmed the trial court's decision, thus allowing Farris to settle his case and to obtain a full release even though he had had knowledge of Preferred's subrogation claim.[36] After stating its conclusion, the court distinguished the instant case from an earlier Mississippi case, *Employers Mutual Casualty Co. v. Meggs*.[37] Factually the two cases were nearly identical, except that Employers Mutual obtained a written assignment of its insured's claim before giving the defendant tortfeasor notice of its subrogation rights.[38] The court in *Meggs*, however, held that dismissal of the insurer's action against the tortfeasor was error.[39] According to the court in *Courtney*, the factor distinguishing the instant case from *Meggs* was the assign-

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[33] *Id.* at 1329-30. The policy required Courtney to execute any paper necessary to secure Preferred's subrogation claim. *Id.* at 1330.

[34] *Id.* at 1331.

[35] *Id.* at 1329.

[36] *Id.* at 1332-33; *accord* Neimann v. Travelers Ins. Co., 368 So. 2d 1003, 1007 (La. 1979) (settlement destroys insurer's claim against the tortfeasor and his insurance company). *But see* Miller v. Auto-Owners Ins. Co., 392 So. 2d 1201, 1203 (Ala. Civ. App. 1981) (release of tortfeasor by injured party after tortfeasor has notice or knowledge of insurer's subrogation rights not a bar to insurer's subrogation claim); *cf.* Thornton v. Insurance Co. of N. Am., 287 So. 2d 262, 268 (Miss. 1973) (partial release signed by widow did not destroy rights of decedent's insurer as to medical, hospital, and funeral expenses that were not included in settlement); Pennsylvania Fire Ins. Co. v. Harrison, 94 So. 2d 92, 94 (La. Ct. App. 1957) (insured may be liable to insurer when he settles with tortfeasor and releases all claims against him).

[37] 229 So. 2d 823 (Miss. 1969).

[38] *Id.* at 824. The court in *Meggs* noted that the burden of proving that notice was received was on Employers Mutual and that it had met that burden. *Id.*

[39] *Id.*

ment obtained by the insurer in *Meggs*.[40]

By distinguishing the two cases, the court highlighted a fundamental difference between subrogation and assignment.[41] An assignment is an act of the parties that depends upon intent and necessarily contemplates the continued existence of the debt or claim.[42] Subrogation, on the other hand, arises by operation of law and is founded upon equita-

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[40] 393 So. 2d at 1333. After the insured assigned his claim to the insurer, he no longer had any claim to release. The claim, at that point, belonged to his insurer. *See* Jacobs v. Fodde, 458 S.W.2d 588, 592 (Mo. Ct. App. 1970) (once claimant assigns his property damages claim, he may no longer maintain cause of action based on the claim); *see also* Todd v. Natchez-Eola Hotels Co., 171 Miss. 577, 586, 157 So. 703, 705 (1934) (insured not precluded from asserting claim against tortfeasor; insurer impliedly waived right to subrogation and did not secure written assignment of insured's claim).

[41] Many courts do not distinguish the two concepts when they discuss an insurer's subrogation rights pursuant to a subrogation clause in the insurance policy. *See, e.g.*, Travelers' Indem. Co. v. Chumbly, 394 S.W.2d 418, 423-24 (Mo. Ct. App. 1965) (since assignment of cause of action for personal injury is void under common law, allowing contractual subrogation to medical payment coverage arising from personal injury should likewise be void); Tennessee Farmers' Mut. Ins. Co. v. Rader, 219 Tenn. 560, 410 S.W.2d 171, 172-73 (1966) (allowing subrogation to medical payments portion of claim arising from personal injury where injured party had executed contractual subrogation agreement). *But see* Damhesel v. Hardware Dealers Mut. Fire Ins. Co., 60 Ill. App. 2d 279, 209 N.E.2d 876, 878 (1965) (recognizing distinction between contractual subrogation and assignment and holding assignment of a personal injury claim void but contractual subrogation to part of proceeds of medical expenses not void).

The above cases point out the reason for contractual subrogation in jurisdictions that recognize it for personal injury claims. If a jurisdiction prohibits assignment of a claim for personal injuries, this absolute prohibition may be partially abrogated by allowing an insurer to be contractually subrogated to the portion of the claim paid by the insurer. For a discussion of some of the drawbacks of contractual subrogation when the tortfeasor has limited assets, see Procaccia, *Denying Subrogation in Personal Injury Claims: A Needed Change of Direction*, 15 WM. & MARY L. REV. 93, 102-04 (1973) (in cases of severe injury, injured party can never be fully compensated, so subrogation should not be allowed). *See infra* note 48.

The common law prohibition against assignment of personal injury claims has been abolished in Mississippi. *See* Anderson v. Kelly, 99 So. 382, 382 (Miss. 1924) (not reported in *Mississippi Reports*) (valid claim for personal injuries may be assigned); MISS. CODE ANN. § 11-7-3 (1972) (any chose in action may be assigned if assignment is in writing). Thus, the need to resort to the concept of contractual subrogation (or conventional subrogation as it is commonly referred to) is not present in Mississippi. An insurer has the ability to take an assignment of the injured party's claim, thus enabling the insurer to recover from a tortfeasor without traveling the circuitous route of contractual subrogation.

[42] Comment, *Insurance Subrogation in Auto. Medical Payments Coverage*, 19 CLEV. ST. L. REV. 393, 396 (1970) (comparing and contrasting effects of subrogation and assignment).

ble principles.[43] The subrogee insurer steps into the shoes of the subrogor insured, and the rights of the insurer are subject to the equitable defenses that the defendant has against the insured.[44] Subrogation is applied liberally "for the protection of those who are its beneficiaries, but it will not be allowed where it would work injustice to the party against whom it [is] claimed."[45]

The court found that to allow subrogation in the instant case would have resulted in an injustice to Farris because of the collateral source rule.[46] The collateral source rule prohibits a defendant from raising at trial the fact that the plaintiff has already been compensated for his injury by his insurer.[47] Since Farris could not reduce the amount of his settlement by the amount Preferred had paid the Courtneys, Farris' settlement was for the full amount of the Courtneys' injuries. If Preferred had been allowed to collect the medical payments and loss of income payments from Farris, then Farris would have had to pay for those injuries twice.

The collateral source rule gives rise to another potential inequity. By precluding use of the insurance payments to reduce the defendant's obligation, the plaintiff may be permitted a double recovery—once from his insurance company and once from the defendant. In jurisdictions that prohibit the assignment of personal injury claims, the doctrine of conventional subrogation has been used to prevent such double recoveries.[48] Moreover, in jurisdictions, such as Mississippi, that do not

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[43] 6A J. APPLEMAN, *supra* note 8, § 4054, at 142 (1972) (doctrine of subrogation originates in general principles of equity and does not depend on statutory or policy provisions).

[44] *See* Foster Estates, Inc. v. Wolek, 105 N.J. Super. 339, 252 A.2d 219, 220 (App. Div. 1969) (rights of subrogated insurer equal to insured's rights).

[45] 6A J. APPLEMAN, *supra* note 8, § 4051, at 110 (1972); *see* National Sec. Fire & Casualty Co. v. Mazzara, 289 Ala. 542, 268 So. 2d 814, 817-18 (1972) (subrogation not absolute right and will not be allowed if result inequitable).

[46] 393 So. 2d at 1331-33.

[47] *Id.* at 1331; *see* Taft v. Gist, 293 So. 2d 641, 644 (La. Ct. App. 1974) (payments from collateral source not admissible to reduce amount of damages assessed against tortfeasor); Clary v. Global Marine, Inc., 369 So. 2d 507, 509-10 (Miss. 1979) (defendant may not assert compensation received by plaintiff from collateral source to mitigate damages); Ward v. Mitchell, 216 Miss. 379, 385, 62 So. 2d 388, 391 (1953) (payments from collateral source not admissible to reduce amount of damages assessed against tortfeasor). *But see* Travis v. Louisville & N.R., 183 Ala. 415, 62 So. 851, 852, 854 (1913) (plaintiff could not recover from defendant for loss of wages where plaintiff's employer continued to pay him).

[48] *See* Damhesel v. Hardware Dealers Mut. Fire Ins. Co., 60 Ill. App. 2d 279, 209 N.E.2d 876, 878 (1965) (allowing subrogation but noting that assignment of claim would have been void); Tennessee Farmers' Mut. Ins. Co. v. Rader, 219 Tenn. 560, 410 S.W.2d

prohibit the assignment of personal injury claims,[49] a double recovery can be prevented by providing for a written assignment from the injured party to the insurance company. This serves to bar the insured from asserting any rights to the part of the claim assigned.[50] When an assignment has not been secured from the injured party, however, the situation becomes ripe for the party to obtain a double recovery.

In the instant case the insurer, Preferred, did not obtain a written assignment of the Courtneys' claim.[51] Therefore, the only possible way Preferred could recover from Farris was by use of the conventional

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171, 172-73 (1966) (conventional subrogation valid to prevent unjust enrichment of double recovery by insured).

There is broad disagreement among commentators regarding this use of subrogation. *Compare* West, *The Collateral Source Rule Sans Subrogation: A Plaintiff's Windfall*, 16 OKLA. L. REV. 395, 409-14 (1963) (criticizing collateral source rule and advocating more enlightened approach in use of subrogation to alleviate inequities caused by the rule) *and* Note, *Insurance Subrogation in Personal Injury Torts*, 39 OHIO ST. L.J. 621, 630 (1978) (subrogation prevents double recovery by plaintiff in personal injury action despite collateral source rule) *with* Procaccia, *supra* note 41, at 102-05 (advocating denial of subrogation in personal injury actions). Procaccia advocates the denial of subrogation in situations where the defendant's assets are insufficient to compensate fully the plaintiff for his injuries. In severe personal injury cases the plaintiff can almost never be adequately compensated for his pain and suffering. Insurance policies cover only economic losses such as medical expenses and loss of income. If the insurance company is subrogated to the plaintiff's claim for his economic loss and if the defendant's assets are sufficient only to cover the economic loss, the plaintiff receives nothing for his pain and suffering. Thus, the plaintiff is in the same position as an uninsured loss victim would have been. *Id.* at 104.

[49] Farmer v. Humphreys County Memorial Hosp., 236 Miss. 35, 42-43, 109 So. 2d 356, 360 (1959); MISS. CODE ANN. § 11-7-3 (1972).

[50] The effect of an assignment is thus to prevent double recovery by a plaintiff in much the same way as subrogation does in other jurisdictions. In jurisdictions that follow the subrogation approach, the insurer has an equitable right to the proceeds equal to the amount paid to the injured party under the insurance policy. *See* Note, *supra* note 48, at 630. In Mississippi the insurer has a legal right to the amount of the claim assigned. Employers Mut. Casualty Co. v. Meggs, 229 So. 2d 823, 824 (Miss. 1969). The insurer assignee also becomes a necessary party to a suit by the injured party against the tortfeasor. *See* A.K. McInnis Lumber Co. v. Rather, 111 Miss. 55, 59, 71 So. 264, 265 (1916) (joinder necessary to prevent splitting of action that would result in multiple suits). The effect of all this is that the tortfeasor pays the total amount owed only once and the proceeds are distributed to the insurer and the injured party according to their agreement. *See* Wells v. Edwards House & City Ry. Co., 96 Miss. 191, 195, 50 So. 628, 629 (1909) (payment to assignor after notice of the assignment does not extinguish tortfeasor's debt to assignee); Peck-Hammond Co. v. Williams, 77 Miss. 824, 830, 27 So. 995, 996 (1900) (subsequent conduct by assignor cannot affect rights of assignee).

[51] 393 So. 2d at 1332. The Courtneys' policy required them to execute any papers necessary to secure Preferred's subrogation rights. Preferred, however, never obtained a written assignment of the claim from the Courtneys. *Id.* at 1330, 1332.

subrogation theory. Subrogation is an equitable principle, however,[52] and, had the court applied it, Farris would have had to pay twice for the same debt, an obviously inequitable result. Since Preferred could have precluded Farris from paying twice by securing a written assignment of the Courtneys' claim after paying it,[53] the court ruled that it would be "contrary to all principles of equity" later to aid Preferred by exacting a double payment from Farris.[54]

III. Implying Agency Relationships Between Insurers and Employers

In *Home Life Insurance Co. v. Chandler*,[55] the Mississippi Supreme Court was confronted with the issue of whether an employer under a group life insurance plan is the agent of the insurance company. If an agency relationship is established, the employer's actions bind the insurance company, and the employer owes the same duty of good faith to the employee as does the insurer.[56] The specific issue in *Chandler* was whether the employer could waive or alter the policy requirements.[57] While the court found it unnecessary to reach a conclusion on the issue since it held that the deceased employee had not met the insurability requirement of the policy,[58] because the employee's

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[52] *See supra* note 43 and accompanying text.

[53] 393 So. 2d at 1332; *see supra* note 40.

[54] 393 So. 2d at 1332.

[55] 402 So. 2d 356 (Miss. 1981).

[56] See *infra* note 61.

[57] 402 So. 2d at 358.

[58] *Id.* at 360. Any employee could be covered under the policy if he chose to be, but if the employee requested coverage more than 31 days after he became eligible, he had to furnish proof of his eligibility. Chandler made his request for coverage long after the 31 day grace period. He did not, however, furnish any proof of insurability. *Id.* at 357-58. The court found that Chandler had sufficient notice of the insurability requirement. *Id.* Since he failed to meet the requirement he never became a covered employee under the plan. *Id.* at 358.

Chandler's theory for recovery was based on the fact that his employer had never told him of the proof of insurability requirement. In fact, the employer had filled out Chandler's enrollment card erroneously, showing that he had been employed for only 30 days prior to requesting coverage under the plan. *Id.* at 357. Based on this misstatement, Home Life issued a certificate of coverage. Chandler's first and only premium paid on the insurance was returned once Home Life discovered that Chandler had not met the proof of insurability requirement for late entrants. *Id.* at 359. Chandler died before a second premium could be paid. *Id.*

Undoubtedly, part of the reason for the court's decision was the fact that Chandler knew he could not pass the exam required to prove his insurability. He had a serious heart condition and only eight days prior to his request for coverage had had a malignant

contention was one of first impression,[59] the court did address it.

According to the court, the majority of jurisdictions hold that an employer under a group plan is not the agent of the insurer but, rather, is the agent of its employees.[60] To the contrary is the minority position, which holds that the employer is the agent of the insurer in certain situations.[61]

A review of the cases holding an employer to be the insurer's agent, the minority rule, reveals that many times a court's reasons for its decision are left unstated. It appears that the courts consider the facts, weigh the equities, and then imply the agency relationship in order to achieve a just result.[62] The situation is often one in which the employee has done everything within his power to comply with the pol-

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growth removed from his back. *Id.* at 358. He died two months after the growth was removed. *Id.* at 358-59.

[59] *Id.* at 358. The court acknowledged that the issue had been indirectly addressed in Magee v. Sun Life Assur. Co., 182 Miss. 287, 180 So. 797 (1938). *Chandler*, 402 So. 2d at 359. In *Magee* the court held that the employee was not covered under the plan, but the question of whether an agency relationship between the employer and the insurer existed was addressed only in dictum. 182 Miss. at 289-90, 180 So. at 799. In reaching its decision in *Magee*, the court treated the problem as one of contract interpretation, rather than as a question of the existence of an agency relationship. Thus, the court in *Chandler* refused to accept *Magee* as precedent. 402 So. 2d at 360.

[60] 402 So. 2d at 359. Boseman v. Connecticut Gen. Life Ins. Co., 301 U.S. 196 (1937), was cited in *Chandler* as the leading case for the majority position. 402 So. 2d at 359. In *Boseman*, the United States Supreme Court stated:

> When procuring the policy, obtaining applications of employees, taking payroll deduction orders, reporting changes in the insured group, paying premiums and generally in doing whatever may serve to obtain and keep the insurance in force, employers act not as agents of the insurer but for their employees or for themselves.

301 U.S. at 205; *see also* Blue Cross-Blue Shield v. Fowler, 43 Ala. App. 572, 195 So. 2d 910, 915 (1966) (employer failed to forward premiums to insurer; no agency relationship between employer and insurer found to exist), *cert. denied*, 280 Ala. 708, 195 So. 2d 919 (1967); Couch v. Connecticut Gen. Life Ins. Co., 216 So. 2d 72, 74 (Fla. Dist. Ct. App. 1968) (employer's failure to forward premiums deducted from employee's paychecks did not create agency relationship between insurer and employer).

[61] 402 So. 2d at 359; *see, e.g.*, Washington Nat'l Ins. Co. v. Burch, 293 F.2d 365, 367 (5th Cir. 1961) (employer held agent of insurer and thus could not unilaterally reduce employee's coverage); Neider v. Continental Assur. Co., 213 La. 621, 35 So. 2d 237, 240-41 (1948) (employer held agent of insurer and owed good faith duty to give employee notice before terminating employee's coverage).

The court in *Chandler* stated that the minority position was supported by good reasoning, but failed to discuss which points it found persuasive. 402 So. 2d at 359.

[62] *See* Comment, *Group Insurance: Agency Characterization of the Master Policy-Holder*, 46 WASH. L. REV. 377, 406-07 (1971) (implying agency relationship leads to more equitable results in most situations).

icy requirements and has reason to believe that he is covered, but has been technically disqualified by some action of his employer.[63]

Couch v. Connecticut General Life Insurance Co.[64] provides a good example of the hardship that can result when the employer and the insurer are held not to be in an agency relationship. The employer in *Couch* sent notice to the insurer to cancel the employee's policy. No notice of the cancellation was given to the employee, and the employer continued to deduct insurance premiums from the employee's paycheck.[65] The Florida court held that, in the absence of a statute or an agreement between the parties, the employer could not be deemed the agent of the insurer.[66] Because of an on-the-job injury, the employee's left leg had to be amputated above the knee;[67] coverage under the policy was denied to the employee.[68]

A similar case, but one in which an opposite result was reached, was *Neider v. Continental Assurance Co.*[69] The group life insurance plan in *Neider* had a provision allowing employees, after terminating their employment, to continue their insurance by paying the premiums themselves.[70] The employee in the case became disabled in February and received his last paycheck in March. He assumed that his insurance premium had been deducted from the paycheck as had been done in the past.[71] The employer, however, had notified the insurer to cancel the employee's insurance and then had not deducted a premium from the employee's paycheck. No notice of the cancellation was given to the employee. In April, when the next premium would normally have been due, the employee sent his wife to make the payment to the employer. The employer refused to accept the payment.[72] In deciding that the employee was still covered by the policy, the Louisiana Supreme Court held that the employer was the agent of the insurer. As such, the em-

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[63] *See, e.g.*, Washington Nat'l Ins. Co. v. Burch, 293 F.2d 365, 367 (5th Cir. 1961) (employer held insurer's agent based on mistake by employer in unilateral reduction of employee's coverage); Neider v. Continental Assur. Co., 213 La. 621, 35 So. 2d 237, 238-41 (1948) (employer held insurer's agent where employer cancelled employee's coverage without notice and then refused employee's tender of payment when employee tried to exercise option to pay premiums himself).

[64] 216 So. 2d 72 (Fla. Dist. Ct. App. 1968).

[65] *Id.* at 73.

[66] *Id.* at 74.

[67] *Id.* at 73.

[68] *Id.* at 74.

[69] 213 La. 621, 35 So. 2d 237 (1948).

[70] 35 So. 2d at 238-39.

[71] *Id.* at 239-40.

[72] *Id.*

ployer owed the employee a duty of good faith and thus should have contacted the employee before terminating his insurance policy.[73]

As one can see, the effect of holding that the employer is not the insurer's agent can cause tremendous hardship on the employee in certain situations. Thus far, however, the courts have not developed a clear-cut formula for determining when an employer will be deemed to be the insurer's agent.[74] Arguably, the best results have been reached when courts have used the agency determination as a means for ensuring justice, rather than as an end in itself.[75] As one commentator has stated:

> [The courts should go] directly to the problem of determining whether . . . the employer should be charged with the performance of certain functions on behalf of the insurance company. If it is found that the employer should be held to act for the company in certain particulars, it is not objectionable to describe the result by saying that the employer is the company's agent for those purposes. If it is determined that in other particulars the employer's acts should not be chargeable to the insurance company, it is equally unobjectionable to label this result by stating that the employer is not the company's agent for those purposes. The harm comes in reversing the process.[76]

Following the above process allows the court to consider the equities of the situation before reaching a conclusion. If the court reverses the process and determines first whether an agency relationship exists, consideration of some of the equities in the case is foreclosed.[77]

Among the factors that should be considered when determining whether an employer's acts should be chargeable to the insurance company are the following. The insurer is in a better position to absorb some losses caused by the employer's misconduct than are the individual employees because of the insurer's ability to spread the risk of such

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[73] *Id.* at 240-41.

[74] *See generally* 16 J. APPLEMAN, *supra* note 8, § 8734 (1981) (examples of cases holding both for and against insured on agency issue); Annot., 85 A.L.R. 1461, 1463 (1933) (same).

[75] *See* Comment, *supra* note 62, at 408-09 (courts should consider equities of each case, rather than agency position of parties, in holding insurer liable for acts of employer).

[76] Hanft, *Group Life Insurance: Its Legal Aspects*, 2 LAW & CONTEMP. PROBS. 70, 86 (1935), *quoted in* Comment, *supra* note 62, at 407.

[77] Comment, *supra* note 62, at 408.

losses to all the participants in the plan.[78] In most cases, the insurer is in a better position to control or to monitor the conduct of the employer than are the employees.[79] Consideration should also be given to the reasonableness of the employee's "reliance that he was in fact covered by the terms of the policy,"[80] as well as to the possibility that the employee may have a cause of action against his employer for breach of the employment agreement.[81] Finally, some consideration should be given to the parties' freedom to contract[82] and the effect of any pertinent statutes.[83]

Since the court in *Chandler* based its holding on other grounds, the law in Mississippi as to whether an employer can be considered the agent of the insurer under a group insurance plan is neutral. The court has provided itself with a clean slate. When the question once again comes before the court, it is suggested that the court adopt an equity-

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[78] *Id.* at 409.

[79] *Id.* The presence of a strong union, however, might make it possible for the employees to be in a better position than the insurer to prevent abuses of the plan by an employer.

[80] *Id.* The fact that other insurance was not procured because the employee justifiably believed himself to be covered under the group plan should be reason enough to imply an agency relationship in some circumstances.

[81] *Id.* at 405-06; *see* Peyton v. United States Steel Co., 369 Pa. 191, 84 A.2d 192, 194-95 (1951) (employer liable to beneficiary for amount beneficiary would have received if employer had not failed to remit premiums to insurer). *But cf.* Thompson v. Pacific Mills, 141 S.C. 303, 139 S.E. 619, 623 (1927) (in absence of contract to provide group insurance, employer is gratuitous agent and owes no duty to employees to keep policy in force).

[82] Comment, *supra* note 62, at 401-02.

[83] *Id.* at 397. This point should be of particular interest in Mississippi because the statutory definition of an insurance agent is extremely broad. MISS. CODE ANN. § 83-17-1 (1972) provides:

> Every person who solicits insurance on behalf of any insurance company, or who takes or transmits, other than for himself, an application for insurance or a policy of insurance, . . . or who shall receive or deliver a policy of insurance of any such company, . . . or transmit any premium of insurance, . . . or do or perform any other act or thing in the making or consummation of any contract of insurance for or with any such insurance company, other than for himself . . . shall be held to be the agent of the company for which the act is done . . . .

This statute is seemingly broad enough to cover many of the functions normally handled by an employer in a group insurance plan. *But cf.* Travelers' Fire Ins. Co. v. Price, 169 Miss. 531, 539-40, 152 So. 889, 891 (1934) (prior version of MISS. CODE ANN. § 83-17-1 (1972) held in derogation of common law and had no application to act of purported agent after consummation of insurance contract). A strict construction of *Price* would severely limit the statute's usefulness to an employee asserting that his employer waived a policy requirement after the contract was in effect.

oriented approach. Mechanical application of vaguely defined agency rules should be eschewed in favor of an analysis that regards the agency determination not as the answer to be sought, but instead as the means to promoting justice and equity.[84]

IV. Other Decisions and Legislation

There were several other decisions of varying significance handed down in the insurance area during 1981.[85] In addition, the legislature

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[84] The court took the first step in this direction by refusing to recognize Magee v. Sun Life Assur. Co., 182 Miss. 287, 180 So. 797 (1938), as controlling precedent. 402 So. 2d at 359; *see supra* note 59. The rigid contract interpretation approach used in *Magee* produced just the type of painful result that can be avoided by using the equity-oriented approach, the minority rule. Under this latter aproach, there would have been a good faith duty on the part of the employer to notify the employee before cancelling his policy. *See supra* note 61 and accompanying text.

[85] Pasco Enterprises, Inc. v. Southland Ins. Agency, Inc., 408 So. 2d 63, 67-68 (Miss. 1981) (insurer not liable on policy when agent acted without authority in accepting premium and insured paid premium to agent rather than to insurer as requried by policy); Aitken v. State Farm Mut. Auto. Ins. Co., 404 So. 2d 1040, 1043 (Miss. 1981) (since person driving insured's car with permission was included as insured party under policy, insured cannot collect damages under uninsured motorist provision if injured while that person driving); State Farm Mut. Auto. Ins. Co. v. Scitzs, 394 So. 2d 1371, 1374 (Miss. 1981) (stacking medical payments coverage of three individual policies not permitted); State Farm Mut. Auto. Ins. Co. v. Commercial Union Ins. Co., 394 So. 2d 890, 894 (Miss. 1981) (where insurance carrier contractually bound to defend parties with adverse interests, it must provide independent counsel for each).

The court stated that *Scitzs,* involving stacking of medical payments coverage, was a case of first impression. 394 So. 2d at 1372. Technically, this statement is accurate; however, stacking of uninsured motorist provisions of several policies has been previously addressed by the court. *See, e.g.,* United States Fidelity & Guar. Co. v. Pearthree, 389 So. 2d 109, 112 (Miss. 1980) (allowing stacking of uninsured motorist provisions); Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1380 (Miss. 1977) (same); Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536, 537-38 (Miss. 1975) (same); *cf.* Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 702 (Miss. 1974) (insured cannot stack uninsured motorist coverage for each auto in policy on fleet of four autos).

The court in *Scitzs* analyzed the issue of stacking medical payments provisions from separate policies in virtually the same way it has analyzed the stacking of uninsured motorists provisions in separate policies. 394 So. 2d at 1372-73. In the uninsured motorist stacking cases, the court has considered two factors to be important: first, separate premiums must be paid on the policies, and, second, the limitation of liability clause must be found to be ambiguous. The question of ambiguity has been considered the more important factor. *See 1979 Mississippi Supreme Court Review,* 50 Miss. L.J. 699, 821-27 (1979) (discussing aggregation of claims). Interestingly, the court in *Scitzs* did not mention the first factor, but based the decision not to allow stacking of medical payments solely on the fact that the provisions of the policy were plain and unambiguous as written. 394 So. 2d at 1374.

passed several insurance-related acts in its 1981 session.[86]

The most significant of the acts provides for the shifting of the burden of proof in an uninsured motorist case.[87] At the outset of such a case, the burden is on the insured party to show that the tortfeasor did not have insurance at the time of the accident. By the introduction of certain documents, the insured can shift the burden to the uninsured motorist carrier, thereby requiring the carrier to prove that the tortfeasor was in fact insured. An affidavit from both the owner and the operator of the alleged uninsured vehicle declaring that neither of them had any liability insurance on the date of the accident is sufficient to shift the burden to the carrier.[88] If both the owner and the operator of the alleged uninsured vehicle are residents of Mississippi, then an affidavit from the Commissioner of Public Safety stating that on the date of the accident neither the owner nor the operator of the alleged uninsured vehicle had a liability policy in effect will also shift the burden to the carrier.[89] If either the owner or the operator is a nonresident, two documents are required if the insured cannot obtain an affidavit from the nonresident.[90] The first is an affidavit by the insured that to his knowledge either the owner or the operator of the alleged uninsured vehicle was not a resident of the state of Mississippi on the date of the accident and that neither had a liability policy in effect at that time.[91] The second is an affidavit from the Commissioner of Public Safety in the nonresident's home state that avers that neither the owner nor the operator had liability insurance on the vehicle on the date of the accident.[92]

The passage of this act reflects a common-sense approach to the

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[86] *See* Act of Apr. 20, 1981, ch. 510, 1981 Miss. Laws 1500 (codified at MISS. CODE ANN. § 37-29-85 (Supp. 1981)) (allowing limited waiver of sovereign immunity for public junior colleges if board of trustees chooses to buy liability insurance covering official actions); Act of Mar. 20, 1981, ch. 370, 1981 Miss. Laws 882 (codified at MISS. CODE ANN. § 93-13-2 (Supp. 1981)) (allowing recovery from parents of minors under age 18 who wilfully damage property; recovery limited to $2,000 and only applies to situations in which parents would not otherwise be liable); Act of Mar. 18, 1981, ch. 359, 1981 Miss. Laws 802 (codified at MISS. CODE ANN. § 37-41-41 (Supp. 1981)) (limited payments to public school districts from "Accident Contingency Fund" for accidents arising as provided in MISS. CODE ANN. § 37-41-37 (Supp. 1981)).

[87] Act of Mar. 18, 1981, ch. 361, 1981 Miss. Laws 804 (codified at MISS. CODE ANN. § 13-1-124 (Supp. 1981)).

[88] MISS. CODE ANN. § 13-1-124(1)(a) (Supp. 1981).

[89] *Id.* § 13-1-124(1)(b).

[90] *Id.* § 13-1-124(1)(c).

[91] *Id.*

[92] *Id.*

burden of proof problem in uninsured motorist cases. A line must be drawn beyond which the insured does not have to venture to prove his claim; otherwise recovery might be delayed indefinitely. The vehicle owner, the operator, and the Commissioner of Public Safety are the only individuals readily accessible to the insured who have information regarding the insurance coverage of the alleged uninsured vehicle. These individuals thus provide a convenient point from which to terminate the insured's responsibility to provide information on the vehicle's uninsured status. If, after this proof, the carrier continues to maintain that the alleged uninsured vehicle was in fact insured, then it is not unreasonable to expect the carrier to support this belief with proof.

Mike Pumphrey

PROPERTY

In 1981 the Mississippi Supreme Court rendered a number of decisions concerning property law. While several of these cases advanced the law, most were routine. The routine cases, which did little more than clarify existing law, involved landlord-tenant relations,[1] accretions,[2] eminent domain,[3] liens,[4] broker's fees,[5] percentage leases,[6] adverse possession,[7] and other miscellaneous topics.[8]

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[1] Loflin v. Thornton, 394 So. 2d 905, 905 (Miss. 1981) (absent contractual agreement, landlord has no duty to make repairs).

[2] Hawkins v. Walters, 402 So. 2d 336, 337 (Miss. 1981) (restating rule that gradual accumulations of land along river are accretions).

[3] Hattiesburg Realty Co. v. Mississippi State Highway Comm'n, 406 So. 2d 329, 332-36 (Miss. 1981) (implied reversion clause exists in every easement to Commission; easement does not abolish owner's liability for taxes); Louisville & N.R.R. v. Ellis, 402 So. 2d 853, 856 (Miss. 1981) (where city must pay costs of extending street across railroad right-of-way, chancellor must hold hearings to determine the devices necessary to ensure that the grade crossing is safe); Biloxi Dev. Comm'n v. Frey, 401 So. 2d 716, 719-20 (Miss. 1981) (owner of condemned property estopped to assert ambiguous property description in condemnation petition); Robert E. Ratliff Co. v. Mississippi State Highway Comm'n, 400 So. 2d 1211, 1214 (Miss. 1981) (non-use of highway right-of-way and acquiescence to encroachment do not constitute abandonment); Mississippi State Highway Comm'n v. Antioch Baptist Church, Inc., 392 So. 2d 512, 514-15 (Miss. 1981) (additur in eminent domain case is not to be granted if jury verdict is not against the overwhelming weight of the evidence).

[4] Morgan v. Morgan, 397 So. 2d 894, 897 (Miss. 1981) (lien may be imposed on former husband's real property to ensure payment of future alimony); W.H. Hopper & Assocs. v. Dunaway, 396 So. 2d 43, 44-45 (Miss. 1981) (plaintiff may not impose lis pendens lien on property not involved in lawsuit as method of securing judgment).

[5] Mitchell v. State, 402 So. 2d 329, 332 (Miss. 1981) (defendant's personal option to purchase subject property does not relieve him of criminal liability for acting as a real estate broker without license); Crowe v. Beard, 394 So. 2d 899, 902-03 (Miss. 1981) (broker may recover fee pursuant to oral contract).

[6] In Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100 (Miss. 1981), the court ruled that a covenant to remain in business on the part of a percentage lessee will not be implied if the minimum rental charged is substantial. *Id.* at 1103. While the court did not define "substantial," it held that only evidence concerning rent at the time the lease was entered into is admissible in determining substantiality. *Id.* For a discussion of whether a percentage lease imposes a good faith obligation on a percentage lessee to produce profits, see generally Thigpen, *Good Faith Performance Under Percentage Leases*, 51 MISS. L.J. 315, 320-26 (1981).

[7] Hattiesburg Realty Co. v. Mississippi State Highway Comm'n, 406 So. 2d 329, 333 (Miss. 1981) (claim must be hostile for state to possess land adversely); Craft v. Thompson, 405 So. 2d 128, 130 (Miss. 1981) (mere possession not sufficient to constitute adverse possession); Board of Educ. v. Loague, 405 So. 2d 122, 123-25 (Miss. 1981) (all elements

I. PARTITION

The supreme court decided two cases concerning the rights of divorced spouses to partition jointly-owned land. In each case, one ex-spouse was in possession pursuant to the divorce, and the other sued for partition.

In the first case, *Weeks v. Weeks*, Catherine and Edward Weeks were granted a divorce under a joint bill of complaint.[9] Their property settlement agreement provided that Edward was to have possession of their jointly-owned house.[10] Two years later, Catherine filed for partition.[11] The trial court denied her petition,[12] and the supreme court affirmed.[13]

Tenants in common have a statutory right to partition.[14] The supreme court has ruled that this right is absolute if the party seeking partition is in possession of the property.[15] The right of a cotenant not

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of adverse possession must be proved for claimant to be successful).

[8] Craft v. Thompson, 405 So. 2d 128, 130-31 (Miss. 1981) (testimony of surveyor admissible if qualifications of surveyor and quality of his instruments are established); May v. Hunt, 404 So. 2d 1373, 1378-81 (Miss. 1981) (pursuant to an unusually worded will, per stirpes gift to be held in trust does not violate Rule Against Perpetuities); Webb v. Brown, 404 So. 2d 1029, 1031-32 (Miss. 1981) (parol evidence admissible to determine intent of drafter of ambiguous deed); Knights & Daughters of Tabor v. City of Mound Bayou, 404 So. 2d 548, 549-50 (Miss. 1981) (tax assessment becomes final if not properly appealed); S & S Dragline Serv., Inc. v. Baker, 400 So. 2d 930, 933-34 (Miss. 1981) (parol evidence admissible to determine intent of drafter of ambiguous deed); Giesbrecht v. Smith, 397 So. 2d 73, 77 (Miss. 1981) (demurrer to defense of bona fide purchaser for value without notice should not be sustained if purchaser has shown that he relied on the record); Carter v. Brewton, 396 So. 2d 617, 618-19 (Miss. 1981) (if homestead was subject to partition during husband's lifetime, widow cannot prevent partition, since she gains no greater rights through her husband's death); Deposit Guar. Nat'l Bank v. E.Q. Smith Plumbing & Heating, Inc., 396 So. 2d 6, 6-7 (Miss. 1981) (correcting judgment and recalling mandate reported at 392 So. 2d 208 (Miss. 1980)).

[9] Weeks v. Weeks, 403 So. 2d 148, 148 (Miss. 1981). The divorce was granted on the ground of irreconcilable differences. *Id.*

[10] *Id.*

[11] *Id.* at 149. Catherine filed pursuant to MISS. CODE ANN. § 11-21-3 (1972). See *infra* note 14 for the pertinent text of § 11-21-3.

[12] 403 So. 2d at 149.

[13] *Id.*

[14] MISS. CODE ANN. § 11-21-3 (1972). The statute provides, "Any person owning an indefeasible fee simple title to an undivided interest in land may procure a partition of said land . . . ."

The dissolution of a marriage does not affect the title of the divorcing spouses to jointly-owned realty. Miller v. Miller, 298 So. 2d 704, 706 (Miss. 1974). Therefore, spouses who were cotenants before divorce remain cotenants. *Id.*

[15] Garrett v. Colvin, 77 Miss. 408, 412, 26 So. 963, 963 (1899). This right is absolute

in possession, however, is not absolute and may be restricted, provided the restriction is reasonable.[16]

In *Weeks,* the court ruled that the property settlement agreement was a reasonable restriction on Catherine's right to partition.[17] Thus, Catherine was estopped by the agreement from obtaining partition.[18]

In the second case, *Sartin v. Sartin,*[19] it was the wife, Levonia Sartin, who had possession of the marital home.[20] Unlike Edward Weeks, whose possession arose from a property settlement agreement,[21] Levonia possessed pursuant to a divorce decree.[22] Elbert Sartin, Levonia's ex-husband, sued for partition.[23] The trial court sustained Levonia's demurrer to the bill,[24] and the supreme court affirmed.[25]

The supreme court found *Weeks* persuasive but not controlling.[26] The court noted that Elbert Sartin had not appealed the divorce de-

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no matter how inconvenient the partition may be. Barnes v. Roger, 206 Miss. 887, 893, 41 So. 2d 58, 60 (1949). It is not essential that the cotenants have equal estates in the land. Lynch v. Lynch, 196 Miss. 276, 282, 17 So. 2d 195, 196 (1944); Black v. Washington, 65 Miss. 60, 63, 3 So. 140, 140 (1887).

The supreme court has held specifically that ex-spouses in possession may obtain partition against their former marriage partners. *E.g.*, Welborn v. Welborn, 386 So. 2d 722, 725 (Miss. 1980) (ex-wife entitled to partition of property held in joint tenancy); Blackmon v. Blackmon, 350 So. 2d 44, 47 (Miss. 1977) (prior divorce decree granting wife exclusive use of house did not create property right so as to defeat her own partition action).

[16] Wiemer v. Pierce, 203 So. 2d 598, 603 (Miss. 1967). For a discussion of cases from other jurisdictions involving contractual restrictions on partition, see Annot., 37 A.L.R.3D 962 (1971).

[17] 403 So. 2d at 149. The supreme court has held that property settlement agreements are binding if fair, equitable, and supported by consideration. Stone v. Stone, 385 So. 2d 610, 614 (Miss. 1980).

[18] 403 So. 2d at 149; *accord* Nazzisi v. Nazzisi, 203 Cal. App. 2d 121, 21 Cal. Rptr. 396, 396 (1962) (property settlement held to bar partition by non-possessing spouse); Miranda v. Miranda, 81 Cal. App. 2d 61, 183 P.2d 61, 66-67 (1947) (same); Hepler v. Burnham, 24 N.C. App. 362, 210 S.E.2d 509, 511 (1975) (same).

[19] 405 So. 2d 84 (Miss. 1981).

[20] *Id.*

[21] *See supra* text accompanying note 10.

[22] 405 So. 2d at 84-85.

[23] *Id.* at 85.

[24] *Id.*

[25] *Id.* at 87.

[26] *Id.* at 86. Edward Weeks' rights arose from a voluntary settlement contract, and Catherine Weeks was estopped by the agreement from seeking partition. *See supra* notes 9-13, 17-18 and accompanying text. The Sartins, on the other hand, had reached no agreement; Levonia Sartin possessed pursuant to a judicial decree. 405 So. 2d at 86-87. The court reasoned that since the Sartins' decree was not a contract, *Weeks* was not controlling and Elbert Sartin was not estopped from seeking partition. *Id.*

cree[27] and viewed Elbert's seeking partition as an attempt to circumvent appellate procedure by attempting to modify a decree without appealing it.[28] The supreme court affirmed the lower court's decision.[29]

Weeks and *Sartin* may appear to impose a harsh restriction on the right of a cotenant to partition. The restriction seems less harsh, however, when one considers another important interest, that of promoting the effectiveness of judicial decrees. If the non-possessing ex-spouse were allowed partition of property, possession of which was awarded to the other spouse, the decree or agreement giving that award would be effective only so long as it would take for a complaint for partition to be filed.[30] *Weeks* and *Sartin* preserve the right of the possessing ex-spouse to partition, while protecting the effect of property settlements and divorce decrees.

II. Foreclosure—Attorney's Fees

In *Mississippi Hill & Delta Savings & Loan Association v. Valley Bank*,[31] the supreme court considered whether an attorney's fees provision in a foreclosed deed of trust may later be challenged as unreasonable when property is sold at a nonjudicial foreclosure.[32] The Powells executed a deed of trust to Mississippi Hill & Delta Savings & Loan Association (Hill & Delta) as security for a note.[33] The deed of trust, which was duly recorded,[34] provided that the proceeds of any foreclosure were first to be applied to the expenses of foreclosure.[35] A fifteen-percent attorney's fee was specified in the deed of trust as a foreclosure expense.[36] After the Powells executed a second deed of trust to the

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[27] 405 So. 2d at 86-87.

[28] *Id.*

[29] *Id.* at 87; *accord* Terrible v. Terrible, 91 Nev. 279, 534 P.2d 919, 919-20 (1975) (partition suit may not take the place of appeal); Goodpasture v. Goodpasture, 115 N.J. Super. 189, 278 A.2d 531, 536 (Ch. Div. 1971) (same).

[30] In Ripp v. Ripp, 38 A.D.2d 65, 327 N.Y.S.2d 465 (1971), *aff'd*, 32 N.Y.2d 755, 344 N.Y.S.2d 950 (1973), the court stated, "From a purely practical view, it is hardly conceivable that the court granting exclusive possession of the home to the defendant expected that its judgment would be effective only for the span of the four months proceeding the commencement of this action." 327 N.Y.S.2d at 468. The New York court's ultimate intention was to protect divorce decrees from modification by unauthorized means. *Id.* at 470.

[31] 392 So. 2d 1126 (Miss. 1981).

[32] *Id.* at 1126-28.

[33] *Id.* at 1126.

[34] *Id.* at 1129.

[35] *Id.* at 1126-27.

[36] *Id.* The attorney's fees were to "accrue immediately upon instructions being given

Valley Bank, they defaulted on their note to Hill & Delta.[37] Nonjudicial foreclosure proceedings were instituted under the first deed of trust.[38] At the sale, Hill & Delta informed Valley Bank of the amount necessary to purchase the property.[39]

After Valley Bank purchased the property at the foreclosure sale,[40] it sued Hill & Delta and was successful in having the attorney's fees provided for in the deed of trust set aside as excessive.[41] The supreme court reversed.[42]

The supreme court found *Valley Bank* to be a case of first impression.[43] While the court has not considered an identical factual situation, it has upheld attorney's fees provisions in a number of instances.[44]

Attorney's fees provisions are neither usurious nor contrary to public policy in Mississippi.[45] The supreme court has held that such provisions are to be enforced even if the debtor was unwise in contracting to pay such fees.[46] Attorney's fees provisions have been upheld in foreclosures of chattel mortgages[47] and in judicial foreclosures of deeds of trust on realty.[48] In addition, the court has ordered the payment of attorney's fees where a nonjudicial foreclosure was instituted but was later enjoined.[49]

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to the Trustee to foreclose." *Id.* at 1127.

[37] *Id.* at 1127.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* Valley Bank requested an accounting in equity of the foreclosure expenses. *Id.*

[42] *Id.* at 1129.

[43] *Id.* at 1126.

[44] *See infra* notes 47-49 and accompanying text.

[45] Powell v. Sowell, 245 Miss. 53, 63, 145 So. 2d 168, 172 (1962); A.W. Tedcastle Co. v. Garfinkel, 148 Miss. 507, 511, 114 So. 326, 326 (1927); M.L. Meacham & Co. v. Pinson, 60 Miss. 217, 226 (1882).

[46] Powell v. Sowell, 245 Miss. 53, 63-64, 145 So. 2d 168, 172 (1962); Early v. Williams, 239 Miss. 320, 328, 123 So. 2d 446, 449 (1960). In *Williams*, the court ruled that "[t]he Court cannot prevent people, who are in their right mind and under no disability, from making contracts nor rescue them from their folly." 239 Miss. at 328, 123 So. 2d at 449. The court reasoned that as long as the attorney's fees provision was not contrary to public policy, *see supra* note 45 and accompanying text, it would be upheld no matter how improvident or unwise it appeared to be. 239 Miss. at 328-29, 123 So. 2d at 449.

[47] *See, e.g.*, Early v. Williams, 239 Miss. 320, 328, 123 So. 2d 446, 449 (1960) (attorney's fees provision in chattel mortgage upheld); M.L. Meacham & Co. v. Pinson, 60 Miss. 217, 226 (1882) (same).

[48] *See* Millsaps v. Chapman, 76 Miss. 942, 955, 26 So. 369, 370 (1899) (attorney's fees must be paid upon judicial foreclosure).

[49] Burt v. Brashears, 118 Miss. 339, 345, 79 So. 182, 184 (1918). In *Burt*, a deed of

In *Valley Bank*, the supreme court noted that Valley Bank had knowledge of the attorney's fees provision in the first deed of trust when it accepted the second deed of trust.[50] The court further noted that Valley Bank had included attorney's fees in its calculation of the purchase price[51] and ruled that Valley Bank's knowledge estopped it from claiming that the fees were excessive.[52]

The supreme court's decision in *Valley Bank* was merely a logical extension of the established policy of enforcing contractual attorney's fees provisions.[53] The court predicted that its decision would serve to promote nonjudicial foreclosure.[54] In addition, the decision prevents the development of any cloud on the title of the property's purchaser.[55]

In conclusion, *Valley Bank* is an equitable decision. It should promote the smooth nonjudicial foreclosure of deeds of trust and the certainty of purchase price at foreclosure sales.

III. Restrictive Covenants

In *A.A. Home Improvement Co. v. Hide-A-Way Lake Club, Inc.*,[56] the supreme court ruled that a restrictive covenant providing "[n]o lot shall be used for other than residential purposes"[57] prohibited a lot's use as a right-of-way for ingress to and egress from a restricted, high security subdivision.[58]

Hide-A-Way Lake is a private subdivision surrounded by a fence, through which there is only one entrance.[59] Smith, the owner of an unimproved lot in the subdivision, used his lot as a roadway connecting

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trust was executed to secure a note containing a 10% attorney's fees provision. *Id.* at 340-41, 79 So. at 182. The debtor defaulted and, after nonjudicial foreclosure proceedings were instituted, the debtor died. *Id.* at 341, 79 So. at 183. The debtor's administrator had the sale enjoined. *Id.*, 79 So. at 183. The court ruled that since the notes had been turned over to an attorney for collection, the duty to pay attorney's fees had arisen even though the sale was never completed. *Id.* at 344-45, 79 So. at 184.

[50] 392 So. 2d at 1129.

[51] *Id.*

[52] *Id.*

[53] *See supra* notes 45-49 and accompanying text.

[54] 392 So. 2d at 1128.

[55] *Id.* The court expressed concern that a subsequent purchaser's title would be uncertain during the time in which the foreclosure purchaser might file suit to set aside attorney's fees. *Id.* The court, however, did not declare the uncertainty a cloud, since it upheld the attorney's fees. *Id.* at 1128-29.

[56] 393 So. 2d 1333 (Miss. 1981).

[57] *Id.* at 1335.

[58] *Id.* at 1337.

[59] *Id.* at 1334.

a street in Hide-A-Way Lake with one in Millbrook Estates, an adjacent subdivision.[60] The owners' association[61] brought an action claiming that Smith, by using his lot as a thoroughfare, was violating the covenant[62] restricting the lots to residential use.[63] The chancellor's ruling that Smith's use of the lot was not a residential use was affirmed by the supreme court.[64]

The supreme court reasoned that since the covenant was not ambiguous, any use of a lot must be "reasonably incidental to residential uses."[65] The court found that Smith's road destroyed the desired security and isolation of the subdivision because the road was connected with a street outside Hide-A-Way Lake.[66] The court concluded that Smith's use was not incidental to a residential use and, therefore, violated the covenant.[67]

The court's decision is well-reasoned and is based on sound principles.[68] One must be careful, however, not to construe *A.A. Home* as prohibiting all streets from all residential lots. For example, many private roads crossing subdivision boundaries have been allowed to re-

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[60] *Id.* A.A. Home Improvement Company owned the lot in Hide-A-Way Lake. Millbrook Estates owned the adjacent lot. Both companies were owned by Smith. *Id.* In 1976, Smith obtained a ruling that he owned that part of the fence separating his two lots. He removed the fence and used the two lots as a thoroughfare. *Id.*

[61] Hide-A-Way Lake Club is the owners' association. *Id.*

[62] *Id.* at 1335. The covenants were recorded in the chancery clerk's office and were presumed to be valid. *Id.* at 1334.

[63] *Id.* at 1335.

[64] *Id.* at 1337.

[65] *Id.* at 1336; *see also* Schaeffer v. Gatling, 243 Miss. 155, 159, 137 So. 2d 819, 820 (1962) (language of covenant to be read in its ordinary sense; restriction should not be extended by strained construction); Mendrop v. Harrell, 233 Miss. 679, 688, 103 So. 2d 418, 422 (1958) (covenant to be interpreted to carry out its object, purpose, and intent). In Carter v. Pace, 227 Miss. 488, 86 So. 2d 360 (1965), the court ruled that "where there is no ambiguity in the language used, there is no room for construction and the plain meaning of the language governs." *Id.* at 494, 86 So. 2d at 362 (quoting 7 G. THOMPSON, REAL PROPERTY § 567 (perm. ed. 1940)). In *A.A. Home*, the plain meaning of the covenant's language compelled that a lot's use be reasonably related to a residential purpose. 393 So. 2d at 1336.

[66] 393 So. 2d at 1336.

[67] *Id.* at 1337.

[68] Courts of other jurisdictions have reached similar conclusions. *See, e.g.*, Thompson v. Squibb, 183 So. 2d 30, 31-33 (Fla. Dist. Ct. App. 1966) (road into area outside subdivision violated covenant); Klapproth v. Griniger, 162 Minn. 493, 203 N.W. 418, 419 (1925) (easement allowing pedestrians to walk through subdivision on way to lake violated covenant); Long v. Branham, 271 N.C. 264, 156 S.E.2d 235, 243 (1967) (road connecting with outside subdivision violated covenant); Donald E. Baltz, Inc. v. R.V. Chandler & Co., 248 S.C. 484, 151 S.E.2d 441, 444 (1966) (same).

main.[69] In addition, covenants that have the same intent as Hide-A-Way Lake's, but which contain different language, have been held to permit various types of roads.[70] *A.A. Home* should promote the preservation of the residential nature of many subdivisions. It should not, however, be relied on as controlling in all situations.

IV. Oil and Gas

In *Continental Oil Co. v. Blair*,[71] the supreme court ruled that entirety clauses in oil, gas, and mineral leases are valid in Mississippi.[72] The Blairs' predecessor in interest had leased the land.[73] The lease contained an entirety clause, which provided that no change in the right to receive royalties or other payments would affect the lessee's rights or obligations under the lease.[74]

Continental Oil (Conoco) drilled on a unit adjacent to that in which the Blairs owned a royalty interest.[75] The Blairs claimed that production from these wells was causing internal drainage from their royalty acres[76] and alleged that this practice was a violation of the pru-

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[69] *See, e.g.*, R.R. Improvement Ass'n v. Thomas, 374 Mich. 175, 131 N.W.2d 920, 922-24 (1965) (road into land subject to the same restrictions as was subdivision did not violate covenant); Vinyard v. St. Louis County, 399 S.W.2d 99, 105-06 (Mo. 1965) (road giving access to apartments outside subdivision held permissible); Bove v. Giebel, 169 Ohio St. 325, 159 N.E.2d 425, 428-29 (1959) (road into land subject to same restrictions as subdivision did not violate covenant).

[70] *See, e.g.*, Baxendale v. Property Owner's Ass'n, 285 A.D. 1148, 138 N.Y.S.2d 76, 78 (1954) ("no buildings . . . except one detached single dwelling" were permitted; covenant did not prohibit road), *aff'd*, 309 N.Y. 871, 140 N.Y.S.2d 176 (1955); Mairs v. Stevens, 268 A.D. 922, 51 N.Y.S.2d 286, 286-87 (1944) (all buildings other than single-family dwellings prohibited; a street is not a building and is therefore permitted), *aff'd*, 294 N.Y. 806, 62 N.E.2d 238 (1945).

[71] 397 So. 2d 538 (Miss. 1981).

[72] *Id.* at 541.

[73] *Id.* at 539.

[74] *Id.* at 540-41. The lease provided:

> No change in or division of the ownership of the right to receive royalt[ies] . . . shall operate to increase or enlarge the obligations or to diminish the rights of Lessee hereunder with respect to the location or number of wells or any other obligation whether express or implied, nor shall Lessee be required to separately measure or store or to separately account for royalties or other payments on account of production from any particular portion of the land herein leased.

Id.

[75] *Id.* at 539. Both units were a part of the original lease. *Id.*

[76] *Id.* There are two types of drainage—internal and external. External drainage is drainage from leased lands into adjoining lands that are producing under a different lease. Internal drainage is drainage between two wells located on the same leasehold. 2

dent operator rule.[77] The lower court found that Conoco had an obligation to prevent the internal drainage and had, therefore, violated the rule.[78] On appeal, the supreme court reversed.[79]

The court noted that the lease contained no express covenant to prevent internal drainage.[80] The court found that while the rule is "well stated" that covenants to prevent external drainage are implied absent contrary provisions,[81] there is no such implied covenant to prevent internal drainage.[82]

Entirety clauses are included in leases to make it clear to the lessors and their transferees that any later division of the fee or of the royalty interest will not have any effect upon the lessee's duties of development or operation.[83] Problems surrounding the rights of transferees to receive their royalty share have led to the development of two rules, the apportionment rule and the nonapportionment rule.

The apportionment rule is the minority rule and provides that all royalty owners of a leasehold are compensated for all production, regardless of where on the land the well is actually located.[84] The royalty owner receives royalties in the ratio of his land's area to that of the entire leasehold.[85]

Under the nonapportionment rule, the majority rule, owners are compensated only for production from wells actually located on their land.[86] It is unclear which rule Mississippi follows.[87]

H. WILLIAMS & C. MEYERS, OIL & GAS LAW § 409.3 (1981).

[77] 397 So. 2d at 539. The prudent operator rule is the standard by which the conduct of oil and gas lessees is measured. Monsanto Chem. Co. v. Andreae, 245 Miss. 11, 19, 147 So. 2d 116, 119 (1962). "[Equity] neither requires improvident actions on the part of lessees nor permits lessees to deal unfairly or unreasonably with lessors. It recognizes that duty is measured by what is reasonable under the circumstances." Monsanto Chem. Co. v. Sykes, 245 Miss. 207, 223, 147 So. 2d 290, 297 (1962); *see* America S.W. Corp. v. Allen, 336 So. 2d 1297, 1299 (Miss. 1976) (applying *Sykes* standard).

[78] 397 So. 2d at 539.

[79] *Id.* at 544.

[80] *Id.* at 540.

[81] *Id.; see also* Monsanto Chem. Co. v. Sykes, 245 Miss. 207, 212, 147 So. 2d 290, 291 (1962) (covenant is to be implied); 2 H. WILLIAMS & C. MEYERS, *supra* note 76, § 409.3 (same).

[82] 397 So. 2d at 540 (quoting 2 H. WILLIAMS & C. MEYERS, *supra* note 76, § 409.3 (1980)).

[83] 2 H. WILLIAMS & C. MEYERS, *supra* note 76, § 521.3.

[84] Huie, *Apportionment of Oil and Gas Royalties,* 78 HARV. L. REV. 1113, 1114-15 (1965).

[85] *Id.* at 1115.

[86] 2 H. WILLIAMS & C. MEYERS, *supra* note 76, § 520; Blass & Richey, *An Analysis of the Rights and Duties of the Holder of the Executive Right,* 41 MISS. L.J. 189, 206

Entirety clauses are, in effect, contractual agreements that the apportionment rule is to apply.[88] In *Blair*, the supreme court ruled that such clauses are valid in Mississippi.[89] Thus, Conoco owed no duty to the Blairs to prevent internal drainage.

The court's decision recognizes the validity of clauses that are often included in Mississippi mineral leases. It follows the lead of other jurisdictions[90] and should lend predictability to Mississippi oil and gas law.

Gretchen Welsch Pumphrey

(1970).

[87] In Merrill Eng'g Co. v. Capital Nat'l Bank, 192 Miss. 378, 5 So. 2d 666 (1942), the court recognized nonapportionment as the "well-settled rule" in Mississippi. *Id.* at 397-98, 5 So. 2d at 671. In Griffith v. Gulf Ref. Co., 215 Miss. 15, 60 So. 2d 518 (1952), however, the court ruled that apportionment should apply in some cases. *Id.* at 25, 60 So. 2d at 520. The supreme court has not resolved this apparent contradiction, and commentators have been unable to resolve the conflict. *See, e.g.*, Blass & Richey, *supra* note 86, at 207-08 (Mississippi rule unclear); Huie, *supra* note 84, at 1143-44 (confusion created by *Griffith*).

[88] Hardwicke & Hardwicke, *Apportionment of Royalty to Separate Tracts: The Entirety Clause and the Community Lease*, 32 TEX. L. REV. 660, 671 (1954).

[89] 397 So. 2d at 541.

[90] *See, e.g.*, Hoffman v. Sohio Petroleum Co., 179 Kan. 84, 292 P.2d 1107, 1111 (1956) (purchaser of tract entitled under entirety clause to share in landowner's royalties); Krone v. Lacy, 168 Neb. 792, 97 N.W.2d 528, 531 (1959) (entirety clause imposed valid burden upon lessor's interest). *See generally* Hardwicke & Hardwicke, *supra* note 88, at 663-70.

TORTS

In 1981, the Mississippi Supreme Court decided sixteen tort cases; two of which have been chosen for commentary. The decisions not selected for commentary dealt with negligence,[1] joint venture,[2] respondeat superior,[3] conversion,[4] libel and slander,[5] and the elements of a

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[1] Sheffield v. Sheffield, 405 So. 2d 1314, 1318 (Miss. 1981) (to compute damages in wrongful death action, living expenses of deceased are deducted from present cash value of deceased's life); Akin v. Cowie, 405 So. 2d 903, 907, 909 (Miss. 1981) (contributory negligence instruction that failed to define contributory negligence held harmless error where another instruction defined term; jury's right to consider comparative negligence may justify otherwise inadequate verdict); Sears, Roebuck & Co. v. Devers, 405 So. 2d 898, 902 (Miss. 1981) (recovery for mental distress resulting from simple negligence not allowed where mental distress not accompanied by physical injury or medically cognizable mental injury); Douglas v. Great Atl. & Pac. Tea Co., 405 So. 2d 107, 110 (Miss. 1981) (proof of actual or constructive notice to proprietor required in negligence action absent evidence that proprietor created dangerous condition); Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320, 324 (Miss. 1981) (statute of limitations in MISS. CODE ANN. § 15-1-41 (1972)) (governing actions against architects and contractors for negligent design and construction held constitutional); Illinois C. Gulf R.R. v. Burns, 396 So. 2d 637, 640 (Miss. 1981) (person using private railroad crossing without permission becomes trespasser and railroad's duty to person is not to inflict injury wilfully or wantonly); Bratschi v. Ray, 393 So. 2d 1356, 1359 (Miss. 1981) (affirmed finding of negligence based on circumstantial evidence showing defendant to be only person capable of committing negligent act); Kennedy v. Reed, 393 So. 2d 480, 483 (Miss. 1981) (issue of negligence is for jury and should not be disposed of by peremptory instruction unless as a matter of law recovery cannot be had upon any view of facts established by evidence); Commodore Corp. v. Bailey, 393 So. 2d 467, 471-72 (Miss. 1981) (granting peremptory instruction on issues of negligence and actual damages held proper where defendant's negligence undisputed; granting peremptory instruction as to punitive damages held proper where jury could find gross negligence; jury's award of punitive damages held proper unless arbitrary or unreasonable); Holley v. Funtime Skateland S., Inc., 392 So. 2d 1135, 1137-38 (Miss. 1981) (directed verdict for defendant properly granted where plaintiff knew of and appreciated dangerous condition and continued to expose herself to it).

[2] Evans v. Davis, 401 So. 2d 1096, 1098-99 (Miss. 1981) (joint venture continues unless positive, determinative steps terminate undertaking).

[3] Leaf River Forest Prods. v. Harrison, 392 So. 2d 1138, 1143 (Miss. 1981) (worker assumed status of independent contractor where employer never supervised worker's employees, worker used his own equipment, worker paid his workmen and regulated their time, and worker controlled physical management of equipment).

[4] Masonite Corp. v. Williamson, 404 So. 2d 565, 568-69 (Miss. 1981) (purchaser of converted timber liable for delivered value of timber).

[5] Hayden v. Foryt, 407 So. 2d 535, 536, 538 (Miss. 1981) (employer's defamatory statements concerning employee's employment fell within qualified privilege and were not actionable if made in good faith and without malice; scope of qualified privilege ex-

tort.[6]

I. Sovereign Immunity as a Defense to Tort Liability

In the 1981 term, the Mississippi Supreme Court again confronted the issue of whether to abrogate judicially the doctrine of sovereign immunity as it applies to tort liability.[7] In *French v. Pearl River Valley Water Supply District*,[8] the court upheld the application of the doctrine of sovereign immunity to protect a governmental unit from tort liability, even though that governmental unit had obtained liability insurance.[9]

French brought suit against the Pearl River Valley Water Supply District (District) and members of its Board of Directors, alleging property damage as a result of improper management of the Ross Barnett Reservoir.[10] The declaration stated that a policy of liability insurance had been procured for the protection of the District and the members of its Board of Directors.[11] The trial court sustained the District's demurrer on the ground of sovereign immunity.[12] On appeal, French contended that the existence of the liability insurance policy waived, pro tanto, the defense of sovereign immunity.[13] Affirming the judgment of the trial court, the Mississippi Supreme Court noted that a governmental entity could not be liable unless such liability was expressly or impliedly created by statute.[14] The court held that because no statute waived the immunity of the District or authorized it to

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tends to statements made to persons having a legitimate and direct interest in the subject matter).

[6] Duncan v. Coahoma Bank, 397 So. 2d 891, 894 (Miss. 1981) (bank not liable for mental stress of customer that caused heart attack where bank's exercise of contractual right of set-off not a tortious act).

[7] For a discussion of the Mississippi Supreme Court's prior treatment of the sovereign immunity doctrine, see *1979 Mississippi Supreme Court Review*, 50 Miss. L.J. 699, 888-92 (1979), and *1977 Mississippi Supreme Court Review*, 49 Miss. L.J. 301, 442-46 (1978).

[8] 394 So. 2d 1385 (Miss. 1981).

[9] *Id.* at 1388.

[10] *Id.* at 1386.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1387. French also argued that Miss. Code Ann. § 51-9-121(j) (1972) waived the District's immunity from suit by giving it the power "to sue and be sued in its corporate name." 394 So. 2d at 1386. The supreme court dismissed the argument on the grounds that a general statutory grant of authority to sue a governmental entity does not create tort liability. *Id.* at 1386-87 (quoting Berry v. Hinds County, 344 So. 2d 146, 150-51 (Miss. 1971)).

[14] 394 So. 2d at 1387.

purchase liability insurance for protection against claims for which it had immunity, the unauthorized purchase of liability insurance did not act as a waiver of the District's immunity.[15] The court then reasoned that it is the function of the legislature to abolish the doctrine of sovereign immunity.[16] In a brief dissent, Chief Justice Patterson[17] noted that the more practical approach to the issue would be to allow immunity from suit to be waived to the extent of the insurance coverage.[18]

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[15] *Id.* at 1388. The decision in *French* is consistent with the majority view that a governmental unit's immunity from tort liabilty is unaffected by its unauthorized procurement of liability insurance. *See, e.g.*, Arnold v. Shumpert, 217 So. 2d 116, 119 (Fla. 1968) (immunity not waived where county purchased insurance without statutory authority); Smith v. Board of Educ., 204 Kan. 580, 464 P.2d 571, 575 (1970) (same).

[16] 394 So. 2d at 1387. The supreme court noted that the legislature has enacted exceptions to the doctrine of sovereign immunity by authorizing the purchase of liability insurance by state agencies and political subdivisions. *Id.; see* MISS. CODE ANN. § 19-7-8 (Supp. 1981) (authorizing counties to purchase liability insurance for county motor vehicles and permitting suits to the extent of such coverage); *id.* § 19-13-51 (1972) (granting boards of supervisors discretionary authority to allow payment for damage to stock and property proximately caused by defects in county bridges, causeways, or culverts); *id.* § 37-29-83 (Supp. 1981) (boards of trustees of public junior colleges authorized to purchase liability insurance and immunity from suit arising from the operation of authorized vehicles waived to the extent of liability insurance on such vehicles); *id.* § 37-29-85 (boards of trustees of public junior colleges amenable to suit to the extent of liability insurance coverage); *id.* § 37-41-37 (prohibiting assertion of defense of governmental immunity by county school district sued for negligent operation or maintenance of school bus); *id.* § 41-13-37 (Supp. 1981) (authorizing boards of trustees of county, community, and state hospitals to purchase liability insurance for such hospitals, resulting in waiver of immunity to extent of coverage).

[17] Justice Bowling joined Chief Justice Patterson's dissenting opinion. 394 So. 2d at 1388.

[18] Regarding the court's decision not to abrogate the doctrine of sovereign immunity, Chief Justice Patterson stated that he dissented for the reasons expressed in Justice Bowling's dissenting opinion in Jones v. Knight, 373 So. 2d 254, 257-67 (1979). 394 So. 2d at 1388. *See generally 1979 Mississippi Supreme Court Review, supra* note 7, at 889-91 (discussing Justice Bowling's arguments in favor of judicial abrogation).

Chief Justice Patterson cited Thomas v. Broadlands Community Consol. School Dist. No. 201, 348 Ill. App. 567, 109 N.E.2d 636 (1952), as representative of a more practical response to the issue presented in *French* and reasoned that the existence of liability insurance protected public funds, thereby negating the reason for immunity from suit. 394 So. 2d at 1388. Chief Justice Patterson's dissent and *Thomas* represent the minority view. *See* 57 AM. JUR. 2D MUNICIPAL, SCHOOL, AND STATE TORT LIABILITY § 57 (1971) (general rule is that obtaining liability insurance does not affect a political subdivision's immunity from tort liability). Several jurisdictions, however, have adopted the minority view. *See* Beck v. Claymont School Dist., 407 A.2d 226, 231 (Del. Super. Ct. 1979) (unauthorized purchase of insurance by school board indicates intent to protect itself from liability and immunity is waived); Collins v. Memorial Hosp., 521 P.2d 1339, 1340 (Wyo. 1974) (unauthorized purchase of insurance waives immunity to extent of

The court in *French* had an opportunity to abrogate the antiquated doctrine of sovereign immunity by following one of three lines of reasoning. First, the court could have followed the minority view,[19] as stated in Chief Justice Patterson's dissent. This approach would be justified because the primary reason for sovereign immunity, protection of public funds,[20] had been removed by the procurement of liability insurance.

A second way in which the court could have abrogated the sovereign immunity doctrine is based on the fact that the District acted without the requisite statutory authority[21] when it purchased the liability insurance with public funds.[22] Recognizing this, the court could have refused to allow the District to assert its own unauthorized act as a defense.[23] Even if the court had rejected this approach as too drastic, an equitable result could still have been reached by a more neutral route. The court could have held that this case was dependent on the ultimate effect of the District's insurance coverage and not on whether the purchase of the insurance had been statutorily authorized. This reasoning is justified because the legislature has recognized the effect of liability insurance and has specifically waived immunity from suit for certain governmental entities to the extent of such coverage.[24]

To date, the Mississippi Supreme Court has declined to abolish the doctrine of sovereign immunity, but the court should exercise its judicial power[25] to abrogate the doctrine if the legislature fails to act.[26] Such an act by the court or legislature would be in accord with judicial

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coverage).

[19] *See supra* note 18 and accompanying text.

[20] *E.g.*, Thomas v. Broadlands Community Consol. School Dist. No. 201, 348 Ill. App. 567, 109 N.E.2d 636, 640 (1952) (purpose of doctrine is to protect public funds).

[21] 394 So. 2d at 1388.

[22] *Id.* at 1386.

[23] *See* Collins v. Memorial Hosp., 521 P.2d 1339, 1340 (Wyo. 1974) (allowing hospital board to assert lack of authority to obtain insurance is irreconcilable with notions of fairness and justice).

[24] *See supra* note 16.

[25] *See* 394 So. 2d at 1387 (court possesses authority to abolish doctrine).

[26] The legislature could benefit from the experience of the federal government and states that have enacted tort claims acts. *See generally* Bennett, *Handling Tort Claims and Suits Against the State of Iowa: Part I*, 17 DRAKE L. REV. 189 (1968); Glannon, *Governmental Tort Liability under the Massachusetts Tort Claims Act of 1978*, 66 MASS. L. REV. 7 (1981); Keady, *Federal Tort Claims Act*, 32 MISS. L.J. 276 (1961); Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M. L. REV. 249 (1976); Murphy, *Idaho Tort Claims Act: Notice of Claims*, 12 IDAHO L. REV. 169 (1975)

or legislative action in a majority of states[27] and with the views of legal commentators.[28] Clearly, retention of the doctrine of sovereign immunity can no longer be justified.[29]

II. Sovereign Immunity as a Defense to Contractual Liability

The court confronted the issue of sovereign immunity in *Cig Contractors, Inc. v. Mississippi State Building Commission,*[30] where the court decided whether the defense of sovereign immunity was available to a state agency when sued by a contractor for breach of contract. Cig Contractors entered into a contract with the State Building Commission for the construction of a building at the University of Mississippi.[31] Cig alleged that, pursuant to contract, the Commission had a duty to inspect the work of other contractors on the project prior to the completion of Cig's performance.[32] The Commission failed to make such an inspection, and Cig filed a declaration in circuit court against the Commission, seeking $120,000 in damages.[33] The circuit court sustained the Commission's demurrer on the ground of sovereign immunity.[34] The Mississippi Supreme Court reversed and remanded,[35] holding that the legislature had waived the defense of sovereign immunity from contract liability when it granted the Commission the power to "contract and be contracted with and to sue and be sued."[36] Further-

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[27] *See 1977 Mississippi Supreme Court Review, supra* note 7, at 443 nn. 97-99 (listing states that have judicially or legislatively abrogated doctrine).

[28] *See 1979 Mississippi Supreme Court Review, supra* note 7, at 891 n. 32 (collection of commentary).

[29] *See generally 1977 Mississippi Supreme Court Review, supra* note 7, at 445 (historical justifications for doctrine's existence no longer valid); Comment, *A Case for the Abrogation of Municipal Tort Immunity in Mississippi,* 41 Miss. L.J. 289 (1970) (same).

[30] 399 So. 2d 1352 (Miss. 1981).

[31] *Id.* at 1353.

[32] *Id.* at 1354.

[33] *Id.* at 1353. A prime contractor installed mechanical pipes in the walls of the underground utilities tunnel and backfilled the area around the tunnel under the inspection of the Commission. Cig subsequently placed a concrete slab over the backfilled area. As a result of improper backfilling, Cig had to remove and rebuild the concrete slab it had previously placed over the area. *Id.* at 1353-54.

[34] *Id.* at 1354. The Commission's demurrer also alleged that the declaration failed to state a cause of action. *Id.* Regarding this issue, the supreme court remanded for a determination of whether the contract imposed a duty on the Commission to test and inspect the work of other prime contractors prior to Cig's placement of the concrete slab. *Id.* at 1355-56.

[35] *Id.* at 1356.

[36] *Id.* at 1355; *see* Miss. Code Ann. § 31-11-53(b) (1972) (statutory grant of authority enabling commission to enter into contracts and to sue and be sued).

more, the court indicated that it would not uphold a claim of sovereign immunity in contract actions between a state agency and individuals doing business with that agency.[37]

The general rule is that a state waives its immunity from suit in a breach of contract action when the legislature authorizes the state to enter into a contract.[38] Other jurisdictions, however, have held that a state does not waive the defense of sovereign immunity upon entering into a statutorily authorized contract.[39]

The court in *Cig* held that the Commission's statutory authority to sue and be sued was not limited to revenue-producing projects and that the defense of sovereign immunity as to all contracts entered into by the Commission was thereby waived.[40] The court's holding, however, is not of primary significance. Rather, the importance of the case lies in the fact that the court went a step further by indicating that it was doubtful that a defense of sovereign immunity would ever be upheld in a contract action against the state.[41] This dictum indicates that sovereign immunity could be waived whenever the state has lawfully entered into a contract, regardless of whether there has been a statutory waiver. Thus, the court recognized that the obligations and duties between parties to a contract should be mutually binding.[42]

The holding and dictum in *Cig* represent a step by the judiciary in the direction of complete abrogation of the doctrine of sovereign immunity. The *Cig* decision should, therefore, alert the legislature that

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[37] 399 So. 2d at 1355.

[38] *Id.* at 1355; *accord* Ace Flying Serv., Inc. v. Colorado Dep't of Agriculture, 136 Colo. 19, 314 P.2d 278, 280 (1957) (en banc) (immunity from suit waived when state enters into contract under statutory authority); Blair v. Anderson, 325 A.2d 94, 96 (Del. 1974) (same); Smith v. State, 23 N.C. App. 423, 209 S.E.2d 336, 338 (same), *cert. denied*, 286 N.C. 337, 211 S.E.2d 213 (1974), *aff'd*, 289 N.C. 303, 222 S.E.2d 412 (1976).

[39] *See, e.g.*, Biltmore Constr. Co. v. Florida Dep't of Gen. Servs., 363 So. 2d 851, 854 (Fla. Dist. Ct. App. 1978) (sovereign immunity bars contract action against state in absence of statutory waiver of immunity); Foley Constr. Co. v. Ward, 375 S.W.2d 392, 396 (Ky. 1963) (same); Armco Drainage & Metal Prods. v. State, 4 A.D.2d 366, 165 N.Y.S.2d 276, 281 (1957) (state does not yield sovereignty merely by entering into a contract). The decision of the Kentucky court in *Foley* was later modified by the Kentucky legislature. *See* KY. REV. STAT. ANN. § 45A.245 (Baldwin 1981) (authorizing contract actions against commonwealth).

[40] 399 So. 2d at 1355.

[41] *Id.*

[42] *Id.*

the court's support of sovereign immunity is faltering and that the legislature should take action to abolish the doctrine.[43]

J. Paul Varner

[43] Acts passed by the legislature in 1981 affecting tort law include: Act of April 20, 1981, ch. 510, 1981 Miss. Laws 1500 (codified at MISS. CODE ANN. § 37-29-85 (Supp. 1981)) (waiving sovereign immunity in actions against boards of trustees of public junior colleges to extent of liability insurance coverage); Act of March 20, 1981, ch. 370, 1981 Miss. Laws 882 (amending MISS. CODE ANN. § 93-13-2 (1972)) (increasing to $2,000 plus necessary court costs the maximum amount of damages recoverable from parents for wilful destruction of property by their minor children); Act of March 18, 1981, ch. 359, 1981 Miss. Laws 802 (amending MISS. CODE ANN. § 37-41-41 (1972)) (increasing limitation on damages arising from operation of school buses claimed under the "Accident Contingent Fund"); Act of March 18, 1981, ch. 357, 1981 Miss. Laws 800 (amending MISS. CODE ANN. § 95-3-29 (1972)) (providing that the immunity of certain agricultural operations from nuisance actions shall not apply to any provision of the "Mississippi Air and Water Pollution Control Law").

MISCELLANEOUS

During 1981, the Mississippi Supreme Court decided cases addressing domestic law,[1] wills and estates,[2] and other miscellaneous ar-

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[1] Millien v. State, 408 So. 2d 71, 74-75 (Miss. 1981) (decree terminating wife's parental rights but granting her visitation rights held contradictory and void; where evidence introduced at wife's separate hearing was not introduced at husband's separate hearing, separate decree terminating husband's parental rights held void since "all the evidence in regard to such petition" was not heard as required by statute); Smith v. Smith, 405 So. 2d 896, 897 (Miss. 1981) (husband's duty to pay child's major medical expenses included dental orthopedic treatment); Hoar v. Hoar, 404 So. 2d 1032, 1033-34 (Miss. 1981) (chancellor's interpretation of intent of parties as to meaning of ambiguous property settlement in divorce decree shall not be overturned unless manifestly wrong, and such a divorce decree granted for irreconcilable differences may not be modified unless there is a material change in circumstances); Reyer v. Harrison County Dep't of Pub. Welfare, 404 So. 2d 1023, 1024 (Miss. 1981) (insufficient proof presented to justify termination of parental rights of severely mentally retarded mother and ex-husband of below average intelligence regarding four of five children of marriage in view of evidence of parents' love and concern for children); Weeks v. Weeks, 403 So. 2d 148, 149 (Miss. 1981) (property settlement granting exclusive use, possession, and control of home to one spouse with both spouses sharing in profits of any sale of home precludes spouse not in control of home from partitioning property for reasonable length of time); Diamond v. Diamond, 403 So. 2d 129, 131-32 (Miss. 1981) (alimony may be awarded only after question of alimony presented to court by proper pleadings); Brown v. Robinson, 402 So. 2d 354, 355-56 (Miss. 1981) (third parties, including grandparents, have no visitation rights to children in lawful custody of parent and, in absence of evidence to contrary, the parent is the most capable of acting as guardian of children's estate); Westmoreland v. Jackson, 401 So. 2d 725, 726 (Miss. 1981) (father's duty to pay child support not relieved by misconduct of mother); C.C.I. v. Natural Parents, 398 So. 2d 220, 226-27 (Miss. 1981) (no undue influence in obtaining parental consent to adoption); Morgan v. Morgan, 397 So. 2d 894, 896 (Miss. 1981) (lien affixed to personal and real property of husband to secure future payments of alimony not violative of husband's constitutional rights); Aldridge v. Parr, 396 So. 2d 1027, 1029-30 (Miss. 1981) (chancery decrees and judgments for child support payments based on unreasonable, indefinite, and uncertain provisions void); Coleman v. Hudson, 396 So. 2d 1024, 1026 (Miss. 1981) (presumption that child born in wedlock is legitimate rebuttable only by proof beyond a reasonable doubt); Roach v. Lang, 396 So. 2d 11, 14 (Miss. 1981) (defendant's argument that Rankin County Chancery Court had continuing jurisdiction because it issued writ of habeas corpus awarding custody of child to father after according full faith and credit to a foreign court's decree was rejected in defendant's attempt to have petition for change of custody filed in Coahoma County dismissed; court overruled Leggett v. Leggett, 202 Miss. 435, 32 So. 2d 189 (1947)); Wray v. Wray, 394 So. 2d 1341, 1344-45 (Miss. 1981) (since lump sum alimony awarded only in special circumstances, decree awarding alimony shall be considered providing for periodic payment unless decree awards lump sum alimony by clear and express language); McLeod v. State Bd. of Health, 393 So. 2d 479, 480 (Miss. 1981) (presumption that mother's husband was father of child born within nine months of date

eas of the law.[3] At least one decision pertaining to domestic law was noteworthy. In addition, the Mississippi Legislature recently amended the statutes concerning illegitimate children,[4] including the statute re-

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of divorce decree successfully rebutted by proof beyond reasonable doubt in suit to have husband's name removed as father from birth certificate of child); Rainer v. Rainer, 393 So. 2d 475, 477-78 (Miss. 1981) (proper to consider situation of parties on remand hearing where modification of alimony decree sought based on changes of circumstances occurring between rendition of original decree and remand); Wilson v. Wilson, 392 So. 2d 1131, 1132-35 (Miss. 1981) (no proof of any material change justifying modification of child custody in divorce decree).

[2] Weston v. Lawler, 406 So. 2d 31, 33-35 (Miss. 1981) (under statute providing that in matters testamentary no oath shall be required for any petition, "two witness rule" was not applicable in action originated by filing of petition for will contest); McKellar v. Brown, 404 So. 2d 550, 552-53 (Miss. 1981) (while oral contract to make will is unenforceable, probate of claim for recovery of consideration may be maintained and evidence of such agreement may be presented in order to avoid unjust enrichment); Tillman v. Williams, 403 So. 2d 880, 881-82 (Miss. 1981) (statute regarding spouse's ability to inherit upon renunciation of will must be strictly construed; to be estopped from inheriting, evidence must show clear desertion or bigamous marriage); French v. Druetta, 399 So. 2d 1327, 1329-30 (Miss. 1981) (presentation of claims against estate must present enough information to enable administrator to decide whether to allow claim); Maupin v. Perry, 396 So. 2d 613, 615 (Miss. 1981) (where residuary clause ambiguous and parol evidence does not clarify intent, clause given no effect); McDowell v. Pennington, 394 So. 2d 323, 325 (Miss. 1981) (where confidential relationship proven, presumption of undue influence arises); Moffett v. Howard, 392 So. 2d 509, 511 (Miss. 1981) (absent language in will indicating clear intent of testator to make class gift, presumption arises that gift was made to named individuals).

[3] Cassibry v. State, 404 So. 2d 1360, 1365-71 (Miss. 1981) (affirming conviction of legislator under statute prohibiting a legislator from being interested in a contract with the state if the contract was authorized during his term in office); Quinn v. Branning, 404 So. 2d 1018, 1020 (Miss. 1981) (statute making hunting and shooting on public highways and streets illegal only in county where highways 15 and I-20 intersect unconstitutional as to the limitation to one county, but remainder of statute's restrictions remain in effect); Carter v. Luke, 399 So. 2d 1356, 1357-58 (Miss. 1981) (lower court's election procedure for trustees to Louisville-Winston County school district's board of education would be implemented without resubmittal to United States Attorney General where petition previously objected to was approved by contesting party).

[4] *See* Act of April 23, 1981, ch. 529, § 2, 1981 Miss. Laws 1617 (amending MISS. CODE ANN. § 93-9-9 (1972)) (requiring paternity proceedings to be adjudicated on clear and convincing evidence); Act of April 23, 1981, ch. 529, § 3, 1981 Miss. Laws 1618 (amending MISS CODE ANN. § 93-9-13 (1972)) (revising obligation of father's estate to support illegitimate children to amounts accrued prior to his death; extending time limit for filing action against estate until one year after death of father or within 90 days after the first publication of notice to creditors); Act of April 23, 1981, ch. 529, § 4, 1981 Miss. Laws 1618 (amending MISS. CODE ANN. § 93-9-29 (1972)) (revising orders of filiation requiring father to support illegitimate child to permit awards of support to be more flexible and to omit former cutoff of support when child reached 16 years of age); Act of April 23, 1981, ch. 529, § 5, 1981 Miss. Laws 1619 (amending MISS. CODE ANN. § 93-17-1

garding inheritance by illegitimates.

I. Domestic Law

The issue presented in *Taylor v. Taylor*[5] was one of first impression in Mississippi. The supreme court decided whether a divorce decree, granted on the ground of irreconcilable differences,[6] was modifiable upon the petition of one of the parties.

In *Taylor*, the former wife, alleging a material change in circumstances, petitioned the chancery court to modify a divorce decree. The decree was based on an agreement reached by the parties approximately one week before the divorce, entitled "Separation, Alimony and Property Settlement Agreement."[7] A statute precludes divorce based on irreconcilable differences without the parties' written agreement on the disposition of property rights.[8] The agreement provided for periodic alimony payments each month, with payments on a mortgage and on two life insurance policies included as additional alimony. The agreement also provided that it was a full and final settlement of all property rights and claims and demands for alimony.[9] The chancellor sustained the husband's demurrer to the petition, holding that a divorce decree incorporating an alimony and property settlement agreement was not subject to modification when the agreement explicitly stated that it was a full and final settlement of all claims for alimony.[10] On appeal, the supreme court reversed.[11]

Section 93-5-2 provides that no divorce decree grounded on irreconcilable differences may be granted unless the parties have entered into a written agreement providing "for the custody and maintenance of any children of the marriage and for the settlement of any property rights between the parties. [*This*] *agreement may be incorporated in the decree, and such decree may be modified as other decrees for di-*

(1972)) (granting chancery court jurisdiction to change names or to proclaim legitimacy and heirship in vacation).

[5] 392 So. 2d 1145 (Miss. 1981).

[6] *See* Miss. Code Ann. § 93-5-2 (Supp. 1981) (irreconcilable differences created as ground for divorce).

[7] 392 So. 2d at 1146.

[8] *See* Miss. Code Ann. § 93-5-2 (Supp. 1981) (parties required to make adequate and sufficient provision by written agreement for the settlement of any property rights between the parties).

[9] 392 So. 2d at 1146.

[10] *Id.*

[11] *Id.* at 1149.

vorce . . . ."[12] The supreme court considered whether the legislature intended, by the language emphasized above, to preserve the right to modify periodic payment alimony[13] in divorces granted because of irreconcilable differences.[14] The court held that the legislature did intend to preserve the right of modification even though the decree was based on consent and not on the fault of either party.[15]

The court reasoned that although the irreconcilable differences statute is silent as to whether parties are required to provide for alimony in such an agreement, where the parties voluntarily choose to provide for periodic payment of alimony, the decree incorporating the agreement falls within the purview of the court's power to modify.[16] The majority rejected the argument that the legislature did not intend to allow alimony awards in divorces granted for irreconcilable differences. The court also rejected an argument that the statute grants the right to modify only where the decree relates to the custody and support of children.[17] Rather, the court found that "the legislature . . . intended alimony agreements based upon divorce for irreconcilable differences to be considered and treated as other consent alimony agreements are treated."[18] The fact that the granting of alimony had been conditioned previously on the fault of one party and the innocence of the other was deemed immaterial.[19]

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[12] MISS. CODE ANN. § 93-5-2 (Supp. 1981) (emphasis added).

[13] 392 So. 2d at 1146. The right to modify periodic payment alimony in divorces based on fault is recognized in Mississippi case law. *See, e.g.*, McKee v. McKee, 382 So. 2d 287, 288 (Miss. 1980) (statute provides that courts may modify a final decree as to alimony in spite of agreement by spouses intended as final settlement of all property and alimony questions); Hughes v. Hughes, 221 Miss. 264, 267, 72 So. 2d 677, 677-78 (1954) (alimony and property settlement agreements incorporated into divorce decrees do not bar subsequent judicial reduction of alimony); Lee v. Lee, 182 Miss. 684, 689, 181 So. 912, 912-13 (1938) (alimony decree never a final judgment).

Mississippi statutory law also provides for modification of alimony:

> When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders . . . touching the maintenance and alimony of the wife or the husband . . . . The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require.

MISS. CODE ANN. § 93-5-23 (Supp. 1981).

[14] 392 So. 2d at 1146-47.

[15] *Id.* at 1147.

[16] *Id.* at 1148.

[17] *Id.*

[18] *Id.*

[19] *Id.* Justice Lee dissented, arguing that the modification clause in the irreconcilable differences statute applied only to agreements concerning child custody and support.

An analysis of *Taylor* necessarily begins with an analysis of no-fault divorce. First, divorce is a replacement of the marriage. The matrimonial contract is supplanted by a new express or implied contract, the terms of which are determined by the divorce decree. The divorce decree is framed by either express agreement by the parties or by a judge's interpretation of the laws of the state where the parties reside.[20] In many no-fault states, as in Mississippi, parties may work out their own agreement in advance.[21] This marital settlement agreement is like any other contract. If it meets the requisite elements of a binding contract, in addition to the special rules pertaining to divorce law, it may become a part of the decree.[22] Second, the state has an important interest in the institution of marriage and, therefore, the state retains control over its creation as well as its dissolution.[23] Since the laws of marriage, divorce, and alimony are completely within the control of the legislature, no other state institutions, including the courts, may exercise more power over divorce proceedings than that allowed by the legislature.[24]

There is no rule regarding judicial power to modify a divorce decree that is based on an agreement by the parties. Rather, the power to

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Id. at 1151. The dissent reasoned that awards of alimony are predicated generally on the fault of one party and the innocence of the other. Since no mention of alimony was made in the irreconcilable differences statute, Justice Lee observed that the legislature, aware of the usual requirement of fault for an award of alimony, may have intended by its exclusion of the term "alimony" in preference for the term "property rights" to mean that a "property settlement" agreement is final and cannot be modified. *Id.* at 1150-51. In other words, "property rights" may take the form of "alimony," but a settlement regarding the latter is nevertheless a settlement of the former and thus is not modifiable.

[20] *See generally* R. EISLER, DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE AND THE FUTURE OF WOMEN 23 (1977).

[21] *See id.* (contract prepared before hearing).

[22] *See id.* (contract often incorporated into court decree).

[23] *See generally* Note, *Does No-Fault Divorce Portend No-Fault Alimony?*, 34 U. PITT. L. REV. 486, 495-97 (1973).

[24] *Id.* The role of the state may be altered drastically when a legislature refuses whatever third-party role it might have acquired in a divorce proceeding by virtue of the initial marriage contract. The allowance of no-fault divorce is a recognition by the state that the marriage it created no longer exists except in name. If the legislature removes its control over the dissolution of the marriage contract by allowing the parties to dictate the terms of the divorce contract, courts cannot substitute their own control instead. *Id.*; *see also* Comment, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 U.C.L.A. L. REV. 1306, 1307, 1311 (1970) (justificaiton behind divorce law reform movement was to eliminate hypocrisy in divorce hearings where deliberated matters regarding fault bore little resemblance to real reasons for marriage failure, and fault system frustrated state's interest in preserving marriages that had not irreparably broken down).

modify is governed by the type of divorce statute the particular jurisdiction follows.[25] In states where statutes are ambiguous enough to permit some flexibility by the courts in determining when consent decrees may be modified, the analysis usually centers on whether the agreement was intended to be advisory or to be contractual.[26] Under this analysis, where an agreement is found to be merely advisory, the decree incorporating it is not binding and is subject to modification. Where an agreement is held to be contractual, the decree is bound by the agreement and is not subject to modification.[27] Some courts, however, have ruled that even if a predivorce agreement is a contract, it loses its contractual nature when it merges with a decree and is thus modifiable by the courts without the parties' consent.[28]

In determining whether a predivorce agreement is advisory or contractual in nature, courts look to the language of the agreement and to the intent of the parties.[29] In jurisdictions in which the power to modify depends on whether an agreement is advisory or contractual, the more clearly an agreement indicates an intention by the parties to settle all matters between them, the more likely it is that modification

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[25] For a comprehensive study of various rules of law regarding the power of a court to modify a decree for alimony based upon a predivorce agreement, see Annot., 61 A.L.R.3D 520 (1975).

[26] *See, e.g.,* Armstrong v. Armstrong, 248 Ark. 835, 454 S.W.2d 660, 662 (1970) (court has power to alter alimony payments under ambiguous statute). For examples of such statutes, see ARK. STAT. ANN. § 34-1213 (1962); FLA. STAT. ANN. § 61.14 (West Supp. 1982).

[27] *See, e.g.,* Vorhof v. Vorhof, 532 S.W.2d 830, 832 (Mo. Ct. App. 1975) (decretal alimony, or alimony granted in a decree guided by an advisory agreement, may be modified by a court upon petition of one of the parties; "contractual" alimony, or alimony granted in a decree based on a contract, cannot be modified without the consent of both parties); White v. White, 296 N.C. 661, 252 S.E.2d 698, 700-01 (1979) (under an advisory agreement, parties are bound by the decree *guided by* the agreement; under a contractual agreement, the decree is *based on* the agreement; thus, the parties are bound by the underlying contract). *See generally* Annot., 61 A.L.R.3D 511, 520, 563-75 (1975).

[28] *See, e.g.,* Muss v. Muss, 390 So. 2d 415, 416-17 (Fla. Dist. Ct. App. 1980) (Florida statute intended to permit modification of periodic payment alimony, thus abrogating the contractual nature of agreements providing for alimony; decrees based on such greements are subject to modification unless the parties expressly waive their statutory right by agreeing not to seek modification); *In re* Marriage of Parks, 83 Ill. App. 3d 372, 403 N.E.2d 1346, 1348 (1980) (agreements for payment of alimony become merged into a decree, losing their contractual nature, and thus do not affect the power of courts to alter an alimony provision when change of circumstance justifies modification).

[29] *See* Jones v. Jones, 600 S.W.2d 36, 36-37 (Mo. Ct. App. 1980) (whether alimony award is decretal or contractual depends on intent of parties; each alimony contract must be interpreted upon its own wording to determine intent); Nelson v. Nelson, 516 S.W.2d 574, 577 (Mo. Ct. App. 1974) (same).

will be refused.[30]

Another important factor in determining whether parties meant their agreement as advice to the court or as a contract is the nature of the property settlement provision of the agreement. Courts will consider whether the provision for periodic payment alimony is an integral part of a nonmodifiable property settlement; the support provisions are usually modifiable if they are distinguishable from the property settlement.[31] Mississippi has impliedly recognized the separability of property settlements.[32] If periodic payment alimony cannot be separated from the nonmodifiable portion of the property settlement, courts usually refuse modification.[33] Generally, alimony is considered an integral part of a property settlement if it is given as consideration for something else.[34]

Taylor seems to place Mississippi in line with states holding that agreements made to settle property rights upon divorce, lose their contractual nature and become merged with the final decree, thus remaining subject to modification.[35] Those jurisdictions, like Mississippi, have

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[30] *See* Alley v. Alley, 4 Kan. App. 2d 109, 603 P.2d 215, 216 (1979) (separation agreement incorporated into a divorce decree settling all matters between the parties is not subject to modification, except as the agreement itself may prescribe or as parties may subsequently consent); Cantor v. Cantor, 87 Mich. App. 485, 274 N.W.2d 825, 829 (1978) (interpreting Kentucky law) (if decree incorporates agreement constituting property settlement meant as final settlement between the parties, it is generally not subject to later modification).

[31] *See* Annot., 61 A.L.R.3D 520, 529-30 (1975) (a true property settlement settles property rights and usually does not deal with support; such settlements are generally recognized as immune from modification); *cf.* Lincoln v. Lincoln, 24 Ariz. App. 447, 539 P.2d 921, 925 (1975) (courts have power to modify support provisions but not property settlement agreements).

[32] *See* Hughes v. Hughes, 221 Miss. 264, 268, 72 So. 2d 677, 678 (1954) (support provision containing both property settlement and alimony provisions modifiable as to alimony).

[33] *See* Annot., 61 A.L.R.3D 520, 529-30 (1975) (discussing authorities holding that periodic payment alimony that is inseparable from settlement of property rights is not modifiable).

[34] *See, e.g.,* Jones v. Jones, 42 N.C. App. 467, 256 S.E.2d 474, 476 (1979) (although denominated as periodic payment alimony in a property settlement, if the alimony payments and other property divisions apportioned between the parties in the settlement constituted reciprocal consideration for each other, the periodic payment alimony may not be considered alimony per se subject to modification); White v. White, 296 N.C. 661, 252 S.E.2d 698, 701 (1979) (same); *cf.* Richardson v. Richardson, 598 S.W.2d 791, 795-96 (Tenn. App. 1980) (right to modify in instant case distinguished from denial of modification in an unreported case in which husband was awarded assets in return for monthly support of wife).

[35] *See supra* note 28 and accompanying text.

statutes preserving the power of courts to modify periodic payment alimony.[36] Moreover, *Taylor* is in accord with decisions rendered in Mississippi pertaining to consent decrees granted for fault divorces.[37]

It is arguable whether the no-fault nature of the irreconcilable differences ground for divorce should have produced a different result in *Taylor*. The dissent apparently concluded that since the granting of alimony traditionally has been predicated on fault, the withdrawal of fault as a requirement for divorce should withdraw the right to modify a provision for alimony incorporated into an agreement settling all property rights.[38] The dissent's viewpoint is further supported by the argument that if the legislature removes its control over the dissolution of the marriage contract by allowing the parties to dictate the terms of the divorce contract, courts cannot substitute their control.[39] Mississippi's statute clearly conditions no-fault divorce on the parties' reaching a mutual agreement as to property rights, since it requires that the parties enter into a written property settlement agreement.[40] While it may be argued that the no-fault statute makes property settlement agreements advisory,[41] the statutory language is not clear, and the question was not addressed by the *Taylor* court.

Thus, in view of the foregoing arguments, all property settlement agreements made pursuant to a petition for a divorce based on irreconcilable differences providing for periodic payment alimony should not be viewed as modifiable. Notwithstanding the statute permitting modification of periodic alimony,[42] courts should determine whether a no-

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[36] *See* FLA. STAT. ANN. § 61.08 (West Supp. 1982) (giving courts power to modify periodic payment alimony); ILL. ANN. STAT. ch. 40, § 510 (Smith-Hurd 1980) (same); MISS. CODE ANN. § 93-5-23 (Supp. 1981) (same).

[37] *See, e.g.*, McKee v. McKee, 382 So. 2d 287, 288 (Miss. 1980) (consent decree based on agreement providing for periodic payment alimony was modifiable even though careful wording of the agreement showed spouses intended to settle in full all property rights and alimony); Keller v. Keller, 230 So. 2d 808, 809 (Miss. 1970) (divorce decree indicating it was based on final agreement as to settlement of property rights was modifiable notwithstanding the consensual basis of the decree); *see also* J. BUNKLEY & W. MORSE, AMIS ON DIVORCE AND SEPARATION IN MISSISSIPPI § 6.14 (1957) (consent decrees merely dispense with the necessity of taking proof and making allowances; in all cases it is a decree of the court, not a contract, and is enforceable and modifiable due to the courts' continuing duty and power touching the maintenance and support of the wife).

[38] 392 So. 2d 1150-51 (Lee, J., dissenting).

[39] *See* Note, *supra* note 23, at 495-97 (role of the state in no-fault divorce).

[40] MISS. CODE ANN. § 93-5-2 (Supp. 1981).

[41] *See id.* Arguably, the statutory provision that the court must find "in its decree" that the agreement is adequate makes the agreement advisory and allows the court to make other provisions for the parties.

[42] MISS. CODE ANN. § 93-5-23 (Supp. 1981).

fault property settlement agreement is advisory or contractual in nature before deciding whether it is modifiable. First, the intentions of the parties, as evidenced by the language of the agreement, should be examined. Second, whether the payment of periodic alimony was given as consideration for something else must be analyzed.[43] These steps are important in view of the lack of statutory guidance concerning whether these property settlement agreements are modifiable. Additionally, the analysis would, under limited circumstances, allow parties to contract for alimony payments in periodic installments not subject to modification. Completely eliminating any possibility of parties to contract limits its application of the no-fault statute only to those who have property to divide at the time of the divorce.

In *Taylor,* the parties undoubtedly intended the property settlement agreement to be final. The supreme court went no further than to observe that since the agreement included a provision for periodic payment alimony, it was modifiable. The decision clearly needed more analysis.

II. Inheritance by Illegitimate Children

The statute governing inheritance by and from illegitimate children, section 91-1-15, was substantially amended in 1981 by the Mississippi Legislature.[44] The amended version alters every aspect of the prior statute.

Under the pre-1981 law, the state precluded illegitimate children from inheriting from or through their intestate fathers.[45] According to the former statutory provisions, a child born out of wedlock could be considered legitimate for purposes of paternal intestate succession only if the natural father subsequently married the mother and acknowledged the child as his own.[46] The prior Mississippi statute governing

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[43] *See supra* notes 29-34 and accompanying text.

[44] Act of April 23, 1981, ch. 529, § 1, 1981 Miss. Laws 1615 (codified as amended at Miss. Code Ann. § 91-1-15 (Supp. 1981)).

[45] Miss. Code Ann. § 91-1-15 (1972) (amended 1981); *see* Rias v. Henderson, 342 So. 2d 737, 741 (Miss. 1977) (state may provide for exclusion of illegitimates from inheriting property from intestate natural fathers).

[46] Miss. Code Ann. § 91-1-15 (1972) provided that if "any man beget a child or children by a woman whom he shall afterward marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be legitimate and capable in law to inherit and transmit inheritance as if born in wedlock." The acknowledgement of paternity had to be shown through clear, convincing, and unambiguous evidence. *See* Hulitt v. Jones, 220 Miss. 827, 833, 72 So. 2d 204, 207 (1954) (clear, convincing, and unambiguous evidence is that which is undisputed and uncontradicated

paternity proceedings[47] was designed not to provide for a child's right to inherit, but rather to provide for the child's support.[48]

Prior to its amendment, the statute restricted illegitimates, and their legitimate children, from inheriting from anyone other than their mother and their mother's kindred.[49] The prior statute also discriminated against the children of illegitimates in favor of legitimates of the same degree of kindred. In other words, legitimate heirs inherited from maternal ancestors or collateral kindred to the exclusion of illegitimate heirs of the same degree.[50] The former statute also provided that the mother of an illegitimate, her other children, and her kindred, whether

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and not inherently improbable, incredible, or unreasonable).

[47] *See* MISS. CODE ANN. § 93-9-9 (1972) (amended 1981) (paternity proceedings to establish right to support).

[48] *See* Dunn v. Grisham, 250 Miss. 74, 81, 157 So. 2d 766, 768-69 (1963) (basis of liability under the paternity statute is not to acknowledge the illegitimate child, but to make provision for the support of the illegitimate if he should become a dependent under the law).

There is some indication that where there was acknowledgement of paternity, the subsequent marriage of the natural parents was not necessary to establish an illegitimate's ability to inherit from his father. In Coleman v. Hudson, 396 So. 2d 1024 (Miss. 1981), the intestate's alleged illegitimate daughter had been born while her mother was married to another man. Although her mother lived with the intestate, she never divorced her husband. There was very strong proof that the intestate recognized and acknowledged the daughter as his own. *Id.* at 1025. Notwithstanding this proof, the court, in rejecting the child's attempt to establish herself as the intestate's heir at law, held that the presumption that a child born in wedlock is a legitimate child is one of the strongest presumptions in the law and may be rebutted only by proof beyond a reasonable doubt that the husband was not the child's father. *Id.* at 1026; *cf.* McLeod v. State Bd. of Health, 393 So. 2d 479, 480 (Miss. 1981) (presumption of legitimacy successfully rebutted in suit to have husband's name removed from child's birth certificate by evidence beyond reasonable doubt where mother in divorce petition swore that she and husband had not cohabited since before child's birth). The implication in *Coleman* is that if the presumption of legitimacy can be overcome by evidence beyond a reasonable doubt showing that someone other than the husband is the natural father and that he acknowledged the child, the illegitimate could inherit from the natural father. *Coleman* was decided on April 1, 1981, more than three weeks before the new illegitimate inheritance statute was enacted.

[49] MISS. CODE ANN. § 91-1-15 (1972) (amended 1981). The statute provided that all illegitimate children "shall inherit from their mother, from her other children, and from her kindred, according to the statutes of descent and distribution . . . ." Children of illegitimate children were similarly restricted to inheritance from the maternal side of their mother's or father's family. *Id.* The phrase "children of illegitimates" applies only to legitimate children of illegitimates. Akers v. Johnson, 236 So. 2d 437, 440 (Miss. 1970). Of course, if the children of the illegitimate are also illegitimate, then the same rules apply to them as to their parent.

[50] MISS. CODE ANN. § 91-1-15 (1972) (amended 1981); *see* Akers v. Johnson, 236 So. 2d 437, 439-40 (Miss. 1970) (status of illegitimates under the statute).

or not they were legitimate, could inherit from an intestate illegitimate.[51] The provisions in the prior statute that discriminated against illegitimates and their children were clearly unconstitutional.[52]

The new law enables illegitimate children to inherit from and through their mother and her kindred. The only change from the former law is the addition of the phrase "from and through."[53] The amended version still provides for inheritance from illegitimates, but it prevents inheritance through representation from the father by the maternal side of the family when the illegitimate predeceases the natural father. The same rule applies to the paternal side when the illegitimate predeceases the mother.[54] Of course, whatever an illegitimate child inherits from one parent may be subsequently inherited by the other parent.

Under the new statute, an illegitimate may inherit from the natural father under certain conditions. If the natural parents participated in a marriage ceremony before the birth of the child, the child may inherit from the father even if the marriage was subsequently declared null and void or was dissolved by a court. The child may also inherit if there was an adjudication of paternity or legitimacy before the death of the intestate. This latter condition changes the previous law by specifically providing that an adjudication of paternity entitles an illegitimate child not only to support from the natural father but also to inherit from the father.[55]

If the natural father dies before any paternity or legitimacy proceedings are conducted, an illegitimate cannot inherit unless there is an adjudication of paternity based on clear and convincing evidence in

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[51] MISS. CODE ANN. § 91-1-15 (1972) (amended 1981).

[52] *See* Trimble v. Gordon, 430 U.S. 762, 766 (1977) (invalidating similar Illinois law). In *Trimble,* a paternity order was entered before the death of the intestate adjudicating him as the natural father of an illegitimate child. Under Illinois law, illegitimate children were allowed to inherit only from their intestate mothers. The state court excluded the illegitimate daughter of the intestate from inheriting, even though the paternity order had been entered before the father's death. *Id.* at 764. The Supreme Court reversed, holding that the Illinois distinction for intestate succession violated the equal protection clause of the fourteenth amendment since the distinction could not be justified on the basis of the state's interest in promoting legitimate family relationships nor on the basis that proof of lineal relationships was more readily ascertainable and thus promoted a method of property disposition. *Id.* at 769, 775. For an in-depth study of *Trimble,* see 43 Mo. L. REV. 116 (1978).

[53] The previous statute stated that illegitimates shall inherit "*from* their mother, *from* her other children, and *from* her kindred . . . ." MISS. CODE ANN. § 91-1-15 (1972) (amended 1981) (emphasis added).

[54] *Id.* (Supp. 1981).

[55] *Id.; see supra* notes 47, 48 and accompanying text.

an heirship proceeding.[56] The action seeking an adjudication of paternity must be filed within one year of the death of the intestate or within ninety days after first publication of notice to creditors, whichever is less. This time period runs notwithstanding the minority of the child.[57] The father, on the other hand, may only inherit from his illegitimate child if he has openly treated the child as his own and has not refused or neglected to support the child.[58]

The last major alteration brought about by the new legislation is the abolition of the discrimination in favor of legitimate kindred over children of illegitimates of equal degree where inheriting from the maternal relatives.[59] Under the new statute, children of illegitimates[60] may inherit from and through their mother's or their father's side of the family as if their parents had been legitimate.[61]

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[56] MISS. CODE ANN. § 91-1-15 (Supp. 1981); *see id.* §§ 91-1-27, -29 (1972) (statutes governing establishing heirship).

[57] *Id.* § 91-1-15 (Supp. 1981). If the adjudication of paternity after the death of the intestate takes place outside of Mississippi, the proceeding must have been in a court in the state of residence of the intestate at the time of his death. The paternity action must have been filed within 90 days after the intestate's death. In addition, the paternity or legitimacy must have been established by clear and convincing evidence. *Id.*

[58] *Id.*

[59] *See supra* note 49 and accompanying text.

[60] *See* Akers v. Johnson, 236 So. 2d 437, 440 (Miss. 1970) ("children of illegitimates" applies only to legitimate children of illegitimates).

[61] MISS. CODE ANN. § 91-1-15 (Supp. 1981) provides that the "children of illegitimates and their descendants shall inherit from and through their mother and father according to the statutes of descent and distribution."

RECENT DECISION

EVIDENCE—PRIVILEGES—A PRIVILEGE BASED ON ACADEMIC FREEDOM DOES NOT INSULATE A UNIVERSITY FROM DISCLOSING CONFIDENTIAL EMPLOYMENT INFORMATION

Plaintiff[1] filed suit against her former employer, the University of Georgia,[2] alleging that because of sexually discriminatory practices[3] she had been denied promotion to the rank of associate professor and had been terminated from her employment. During discovery, a professor on the Promotion Review Committee[4] refused to reveal his vote on the plaintiff's promotion, claiming the information was privileged.[5] When the professor still refused to disclose the information after being ordered by the court to do so, contempt sanctions were imposed.[6] On

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[1] The plaintiff, Maija Blaubergs, was an instructor at the University of Georgia. *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3963 (U.S. June 7, 1982).

[2] Plaintiff brought suit under 42 U.S.C. § 1983 (Supp. III 1979) and the Equal Employment Opportunity Act of 1972, *id.* § 2000(e)-1(1976), against the University and the faculty members who were on the College of Education Promotion Review Committee.

[3] 661 F.2d at 431.

[4] James A. Dinnan, the professor who refused to reveal his vote, was one of nine professors serving on the committee that considered plaintiff's promotion application. He was also named as an individual defendant in this action. *Id.* at 427.

[5] *Id.* Under the federal rules a party may obtain discovery of any information that is not privileged. FED. R. CIV. P. 26(b)(1).

[6] 661 F.2d at 427. Contempt sanctions were imposed pursuant to FED. R. CIV. P. 37(b)(1). Dinnan was fined $100.00 a day for 30 days and, upon continued defiance of the court order, a 90-day term of imprisonment would follow. The sanctions would end if Dinnan revealed the desired information. 661 F.2d at 427. Dinnan moved for expedited appeal under 28 U.S.C. § 1826 (1976) or, alternatively, for federal habeas corpus under *id.* § 2255 if the contempt was found to be criminal. The court of appeals found the contempt to be civil and, thus, denied Dinnan's petition for writ of habeas corpus. *In re* Dinnan, 625 F.2d 1146, 1150 (5th Cir. 1980). The court, however, granted Dinnan's motion for expedited appeal. *Id.* The court also considered the constitutionality of the sentence imposed and upheld it. *Id.* at 1148-50.

In the instant appeal, Dinnan again raised the issues of due process and illegality of the sentence. The court of appeals, finding that these issues had already been disposed of by the previous appeal, held that they could not be relitigated on the instant appeal. 661 F.2d at 433.

appeal, the professor alleged that the district court erred in ordering disclosure because the information was protected by the "academic freedom" privilege.[7] The Court of Appeals for the Fifth Circuit, *held*, affirmed. There is no recognized evidentiary privilege based on academic freedom that would enable a professor to withhold information regarding his vote in employment promotion decisions. *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3963 (U.S. June 7, 1982).

The law of evidence is premised upon the concept that all witnesses[8] to a particular case have a general duty to divulge all relevant testimony to aid society and the justice system in ascertaining the truth.[9] Privileges[10] arise as exceptions to the truth-seeking process and are designed to foster certain confidential communications by protecting them from disclosure.[11] They exist to shield various interests and

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[7] 661 F.2d at 427, 431.

[8] Of course, a witness must be competent to testify. This includes having the requisite knowledge of the facts in issue and being able to relate this information to the trier of fact. Barnhart, *Theory of Testimonial Competency and Privilege*, 4 ARK. L. REV. 377, 378 n.2 (1950).

Both an incompetent witness and a witness asserting a privilege may prevent a full and accurate development of the facts in a particular case. The two evidentiary concepts, however, should not be confused. An incompetent witness is barred from testifying because he is deemed to lack capacity; a witness asserting a privilege is exercising a right that he could renounce by testifying. *Id.* at 378.

[9] 8 J. WIGMORE, EVIDENCE § 2192, at 70-73 (J. McNaughton rev. ed. 1961). Wigmore notes that one's duty to tesitfy encompasses the community's right to "every man's evidence as a basic societal privilege, which is necessary to further a fact finding process designed to ultimately unveil the truth." *Id.* at 70; *see also* McMann v. SEC, 87 F.2d 377, 378 (2d Cir. 1937) (one's duty to disclose all pertinent information is above any private interest); United States v. Schiaffino, 439 F. Supp. 898, 904 (E.D.N.Y. 1977) (absent valid privilege, court has right to every man's evidence).

[10] Privilege has been defined as "a peculiar benefit, favor, or advantage, a right . . . not enjoyed by all, . . . a special right or power conferred on or possesed by one or more individuals, in derogation of the general right." Leatherwood v. Hill, 10 Ariz. 243, 89 P. 521, 523 (1906).

[11] Wigmore groups the types of privileges into two categories: the first, "viatorial privilege," exempts one from courtroom attendance but not from testifying; the second, "testimonial privilege," exempts one from testifying. Testimonial privileges may be further subdivided into privileged topics and privileged communications. 8 J. WIGMORE, *supra* note 9, § 2197, at 113-14.

Wigmore also states four conditions that should exist in order for a privilege to be recognized:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

relationships regarded as important enough to society to justify sacrificing evidence that might be needed for a full and fair adjudication.[12]

The law of privileges has developed in two separate legal spheres. First, each state has developed concepts of privilege based on statutory and common law,[13] which are also applied by the federal courts in diversity cases.[14] Second, in cases involving a federal question, the federal courts are required by the Federal Rules of Evidence to determine whether privileges exist based on the court's interpretation of common law[15]—in essence, to develop a federal common law of privileges.

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(3) The *relation* must be one that in the opinion of the community ought to be sedulously *fostered.*

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. § 2285.

[12] McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 447-48 (1938); *see also* Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978) (privileges protect confidential communications serving broad societal goals); Baylor v. Mading-Dugan Drug Co., 57 F.R.D. 509, 511 (N.D. Ill. 1972) (privileges protect relationships more valuable than the evidence lost); Donnelly, *The Law of Evidence: Privacy and Disclosure*, 14 LA. L. REV. 361, 372-73 (1954) (privileges protect the individual's right of privacy); Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 536 (1956) (excluding confidential communications fosters socially desirable confidences).

[13] For a discussion of evidentiary privileges under Mississippi law, see Carraway & Currie, *Privileges*, 48 MISS. L.J. 989 (1977).

[14] FED. R. EVID. 501; *see also* Miller v. Transamerica Press, 621 F.2d 721, 724 (5th Cir. 1980) (reporter's privilege in diversity case determined by law of forum state), *cert. denied*, 450 U.S. 1041 (1981).

[15] FED. R. EVID. 501; *see also* Garner v. Wolfinbarger, 430 F.2d 1093, 1098-99 (5th Cir. 1970) (privilege in federal question case may be determined without reference to state law).

Most lawsuits concerning university employment are based on Title VII violations, thereby conferring general federal question jurisdiction on the court pursuant to 42 U.S.C. § 1343(3) (Supp. III 1979). This casenote deals only with creating new privileges in this situation and does not attempt to determine methods used by federal courts in creating privileges when jurisdiction is based on diversity of citizenship.

A general discussion of the law to be applied in criminal cases, federal question cases, and diversity cases can be found in 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, ¶ 501[02] (1980). For an extensive discussion of existing common law, constitutional, and statutory privileges, see MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 77 (E. Cleary 2d ed. 1972) (privileges have been created for psychotherapists, accountants, and journalists); 8 J. WIGMORE, *supra* note 9, §§ 2227-2245 (privilege of husband and wife not to testify against one another); *id.* §§ 2250-2284 (privilege against self-incrimination); *id.* §§ 2209-2329 (privileged communications between attorney and client); *id.* §§ 2367-2379 (privileges for governmental secrets and official documents); *id.* §§ 2380-2391 (physician-patient privilege); *id.* §§ 2394-2396 (penitent-clergyman privilege).

The federal courts have consistently recognized long-established privileges but have been reluctant to recognize new privileges.[16] With the emphasis in the federal discovery rules on full disclosure,[17] a presumption against privilege claims has been created since privileges tend to inhibit the fact-finding process.[18]

A 1958 court of appeals case illustrating this reluctance is *Garland v. Torre*.[19] The plaintiff sued a newspaper columnist for defamatory statements published in the defendant's newspaper. The defendant alleged that the defamatory statements were originally made by a third person and claimed that the identity of that person was privileged information.[20] In refuting the privilege claim, the court emphasized that the public interest in resolving disputes obligated all persons having an interest in the lawsuit to disclose pertinent information in order to facilitate the search for truth.[21] The court detailed the criteria to apply when one party seeks disclosure of information claimed to be privileged:[22] (1) whether the party seeking the information has alternative ways of obtaining the desired information; (2) whether the information is relevant and goes to the heart of the matter at hand; (3) whether the party seeking disclosure has a compelling interest in the information withheld; and (4) the circumstances and type of controversy between the parties.[23]

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[16] *Compare* United States v. Nelson, 485 F. Supp. 941, 947 (N.D. Mich. 1980) (spousal privilege upheld), *and In re* Grand Jury Proceedings, 434 F. Supp. 648, 650 n.1 (E.D. Mich. 1977) (attorney-client privilege upheld), *aff'd*, 570 F.2d 562 (6th Cir. 1978), *with* United States v. Schoenheinz, 548 F.2d 1389, 1390 (9th Cir. 1977) (court declined to recognize employer-stenographer privilege), *and* Mattson v. Cuyuna Ore Co., 178 F. Supp. 653, 654 (D. Minn. 1959) (no privilege recognized for engineers). *See generally* C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE §§ 5426-5431 (1980) (discussing new privilege claims); Comment, *Confidential Communication Privileges Under Federal and Virginia Law*, 13 U. RICH. L. REV. 593, 601-07 (1979) (comparing privileges recognized under federal and Virginia law).

[17] *See* Hickman v. Taylor, 329 U.S. 495, 501 (1947) (purpose of discovery rules is to allow full knowledge of all issues); 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.56[1] (2d ed. 1981 & Supp. 1981-1982) (discovery rules designed to ascertain all necessary facts and information).

[18] *See* United States v. Nixon, 418 U.S. 683, 710 (1974) (privileges are neither lightly created nor expansively construed because they inhibit the search for truth); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2020, at 176-78 (1970) (courts follow a conservative course in recognizing privileges).

[19] 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958).

[20] 259 F.2d at 549.

[21] *Id.*

[22] *Id.* at 550-51.

[23] *Id.; accord* Adams v. Associated Press, 46 F.R.D. 439, 441 (S.D. Tex. 1969) (relying on similar factors).

Another case illustrating an unwillingness to create broad privileges is *United States v. Nixon.*[24] In that case, the Supreme Court considered and rejected a claim of absolute privilege for presidential communications, opting instead for a qualified privilege.[25] Noting that privileges were neither favored in the law nor readily established,[26] the Court found that, in this case, where the public interest would not be harmed, the interest in disclosure of all relevant information overrode the interest in protecting confidential presidential communications.[27]

A significant development in the law of privileges occurred in 1975 with the enactment of the Federal Rules of Evidence.[28] Congress rejected a proposal that would have specifically defined and delineated the privileges available in federal question cases,[29] and, instead,

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[24] 418 U.S. 683 (1974). A privilege issue arose in this case when the Special Prosecutor filed a motion for a subpoena duces tecum to produce certain tapes and documents. The President filed a motion to quash the subpoena, claiming the communications in question were protected by an absolute executive privilege. *Id.* at 686.

[25] *Id.* at 703-16. The Court recognized the necessity of protecting communications between high government officials and their advisors, but found this generalized interest in confidentiality could not support an absolute executive privilege in all cases. *Id.* at 706. Because the President's claim of privilege did not involve the need to protect military or diplomatic interests, the Court reasoned that the specific need for evidence and the basic demands of due process of law prevailed over the President's unspecified interest in confidential communications. *Id.* at 710-13.

[26] *Id.* at 710; *accord* United States v. Mendoza, 574 F.2d 1373, 1380 (5th Cir.) (privileges impede justice and should be limited), *cert. denied,* 439 U.S. 988 (1978).

[27] 418 U.S. at 713.

[28] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. app. (1976 & Supp. III 1979)).

[29] The Supreme Court submitted to Congress 13 rules concerning privileges, nine of which recognized specific privileges to be applied by the federal courts. Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 230-61 (1972). Included were privileges for lawyer-client, husband-wife, trade secrets, governmental secrets and other official information, psychotherapist-patient, required reports, communications to clergymen, identity of informer, and political vote. *Id.* at 234-56. Another rule specified that privileges other than the nine listed by the Court were limited to those required by the Constitution, federal statute, and Court determination. *Id.* at 230. The other three rules addressed problems of waiver, compulsory disclosure, and jury instruction. *Id.* at 258-60. *See generally* Schwartz, *Privileges Under the Federal Rules of Evidence — A Step Forward?,* 38 U. PITT. L. REV. 79, 80 (1976) (general discussion of privileges as first submitted to Congress by the Court).

Of the 77 proposed rules of evidence submitted to Congress by the Court, the 13 relating to privileges provoked the greatest controversy. Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule Making Power,* 76 MICH. L. REV. 1177, 1178 (1978). Because the proposed rules were to apply to diversity of citizenship as well as federal question cases, Congress felt there were constitutional dimensions involved insofar as the proposed rules eliminated state laws of privilege and possibly

adopted rule 501, which allows the federal courts to determine on a case-by-case basis and "in the light of reason and experience" if a privilege exists.[30] Except where the Constitution or a federal statute creates a privilege, the courts are to look to common law principles to determine whether a privilege exists.[31]

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infringed on substantive rights. 119 CONG. REC. 8333 (1973). Congress also questioned whether the Supreme Court's authority to devise rules of practice and procedure under the enabling acts had been exceeded by promulgating evidentiary rules. *Id.* at 8346. Additionally, disagreements as to whether common law privileges should be codified were widespread, as each privilege that was included or excluded from the proposed rules had the lobbying efforts of special interest groups. Note, *supra*, at 1178. Since there was no agreement as to the content of the specific privilege rules and because Congress wanted to avoid an indefinite delay in passing the proposed rules, a compromise was reached with the passage of FED. R. EVID. 501, effectively leaving the laws of privileges unchanged. Comment, *supra* note 16, at 594 n.8.

[30] FED. R. EVID. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they might be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

In Ryan v. Commissioner, 568 F.2d 531 (7th Cir. 1977), the court noted:

> [I]n making the case by case determination, it is helpful to weigh the need for truth against the importance of the relationship or policy sought to be furthered by the privilege, and the likelihood that recognition of the privilege will in fact protect that relationship in the factual setting of the case.

Id. at 543.

[31] FED. R. EVID. 501.

Throughout the first 150 years of American judicial history the sources of evidence law to be applied in federal question cases remained cloudy, as unnecessary distinctions abounded between civil and criminal cases, as well as between law and equity. Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 619-20 (1976). In 1875, Congress conferred general federal question jurisdiction on district courts over civil causes of action, but courts did not interpret this jurisdictional grant as a requirement to formulate any federal common law of privilege. *See generally* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 664-65 (2d ed. 1973) (admissibility of evidence effected by the Rules of Decision Act). History indicates that the federal courts applied state evidence law in general federal question cases as well as suits founded on diversity of citizenship. Equity courts, exercising their usual discretion, followed their instincts as to what evidence was admissible. Krattenmaker, *supra*, at 619-21.

Between the years 1933 and 1946, the Supreme Court created uniform federal rules of procedure in civil and criminal cases. Each set of rules contained provisions that would aid the courts in resolving claims of testimonial privileges. *Id.* at 622-23. FED. R.

Despite the apparent congressional intent to extend wide latitude to the federal courts in defining privileges,[32] the Supreme Court's approach to privilege law generally remained conservative. Thus, in *Herbert v. Lando*[33] the Supreme Court reaffirmed its stand on limiting the creation of evidentiary privileges,[34] although recognizing that the predominant principle of admitting all relevant evidence is not absolute and often must yield when the need for nondisclosure serves an important public interest.[35]

In *Trammel v. United States*,[36] the Court adopted a more progressive attitude towards privilege claims. Recognizing that rule 501 was enacted to allow for modification among existing privileges and to aid the courts in creating new ones based on reasonable common law principles, the Court reconsidered the validity of the privilege against adverse spousal testimony.[37] The Court reasoned that precedent alone was not sufficient justification for upholding the privilege.[38] Thus,

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CIV. P. 43(2) was applied to determine privilege claims in most federal civil cases and endorsed the broad admissibility of evidence. Although this rule allowed federal courts to disregard state privileges in federal question cases, most decisions indicated a desire to observe the laws of the state in which they sat, and, consequently, no uniform federal privilege law evolved. Krattenmaker, *supra*, at 625-28.

FED. R. CRIM. P. 26 also allowed for privilege claims, and provided that the admissibility of evidence and the competency and privileges of witnesses would be determined by common law principles interpreted in the light of reason and experience. Again, no uniformity was achieved concerning a federal law of testimonial privileges, and it was against this ambiguous backdrop that FED. R. EVID. 501 came into being. Krattenmaker, *supra*, at 629-35.

[32] *See supra* note 29.

[33] 441 U.S. 153 (1979).

[34] *Id.* at 175.

[35] *Id.* at 177. Recognizing the wide discretion afforded judges in discovery proceedings, the Court commented that the courts should not hesitate to exercise their control in restricting the discovery process when one party was threatened with an annoying, oppressing, or embarrassing question as prohibited by FED. R. CIV. P. 26(c).

In Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977), the court employed the discretion afforded by rule 26 in refusing the plaintiff's request to discover confidential faculty evaluations. The court noted there was no abuse of discretion by the lower court in limiting the plaintiff's unduly burdensome request for information and, therefore, upheld the decision to protect the confidentiality of the tenure files. 552 F.2d at 581.

[36] 445 U.S. 40 (1980). Petitioner was convicted on narcotics charges primarily on the basis of his wife's testimony against him. The Court rejected the petitioner's spousal privilege claim, noting that, when the wife willingly testified against her husband, the purpose of the privilege in fostering the marital relationship was no longer needed. *Id.* at 43.

[37] *Id.* at 47-48.

[38] *Id.* at 48. The petitioner claimed the Court's decision in Hawkins v. United

utilizing the flexibility of rule 501, the Court modified the privilege, which had previously allowed one spouse to testify against another only if both consented, to allow the witness spouse unilaterally to determine whether to testify.[39]

The Supreme Court's recognition in *Trammel* of the flexibility of rule 501,[40] as evidenced by its legislative history,[41] has opened the door to new privilege claims. In two recent cases, the federal courts have had to decide whether to recognize a privilege claim by universities based on academic freedom.[42]

Academic freedom has traditionally been concerned with protecting the rights of the individual faculty member, rather than the institutional autonomy of the university.[43] The individual's right of aca-

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States, 358 U.S. 74 (1958), holding that the testimony against one spouse was barred unless both consented, mandated the upholding of the privilege claimed. The Court found otherwise, stating that "the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared." 445 U.S. at 48.

[39] 445 U.S. at 53.

[40] *Id.* at 47.

[41] *See* Note, *supra* note 29, at 1191-92 (legislative history of rule 501).

[42] In addition to the instant case, the issue also arose in Gray v. Board of Higher Educ., 7 LAB. REL. REP. (BNA) (27 Fair Empl. Prac. Cas.) 256 (S.D.N.Y. Nov. 9, 1981), *discussed infra* at notes 74-85 and accompanying text. See also Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 390-91 (N.D. Cal. 1976), where a privilege claim preserving confidentiality between academic researchers and their sources was upheld. *See generally* Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CAL. L. REV. 538 (1981).

[43] Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 881 (1979). The concept of academic freedom arose during the Middle Ages in Europe when groups of scholars formed universities in order to further intellectual advancement. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 431, 433-38 (1963). The universities were sponsored by the medieval church and, thus, were subject to a great deal of religious control. The universities sought to free themselves from this external control by struggling for autonomy in thought and action within the academic environment. It was not until the nineteenth century, when the political state replaced the church's government of universities, that the modern concept of academic freedom came to be formulated. *Id.* at 435-36.

The American idea of academic freedom was apparently derived from Germany, where local universities attracted and offered scholars a place to pursue truth, as well as the opportunity to transmit it to their students. *Id.* at 435. German students were able to pursue their educational careers and personal activities free from governmental intrusion. Regarded as more valuable than the ordinary civil servant, German teachers were encouraged to research independently their field of knowledge and to instruct subjectively their students. *Id.* These recognized freedoms to teach and to study grew up in a society where freedom of speech and action was very limited; consequently, these recognized freedoms were confined within the walls of the academic institution itself. *Id.* at 434.

demic freedom was designed to enable the educator to communicate freely relevant subject matter without fear of reprisal or interference.[44] Since governmental legislation has continued to make inroads into educational institutions, the concept of academic freedom has been expanded to offer greater protection to the university as a separate entity distinct from its employees.[45] Protection of the university's independent interest in academic freedom has developed to shield the general administrative functions of the universities from outside review, to protect the university from unwarranted intrusions into confidential faculty selection methods, and to safeguard the public interest in the development and assimilation of ideas.[46]

On several occasions the Supreme Court has recognized that the individual's academic freedom is worthy of constitutional protection.[47] *Sweezy v. New Hampshire*[48] was the first case in which a majority of the Supreme Court viewed academic freedom as a constitutional right for the individual.[49] The Court reversed a contempt conviction against

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As the concept of academic freedom emerged in America, the freedoms to teach and to learn, which comprised the very essence of the German university, were theoretically extended to all *individuals* who were United States citizens through the liberties guaranteed by the Constitution. Accordingly, the German idea that academic freedom should be characterized as an independent right of the university and protected from outside intrusion was not readily developed into a recognized legal principle in America. *See* Note, *Academic Freedom—Its Constitutional Content*, 40 U. COLO. L. REV. 600, 601-04 (1968) (historical discussion of academic freedom as a constitutionally developing right).

[44] *See* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (right to teach recognized and protected by fourteenth amendment); Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447, 451 n.11 (1963) (freedom to teach subject only to performance of other academic obligations); *Developments in the Law-Academic Freedom*, 81 HARV. L. REV. 1045, 1065-1127 (1968) (teachers deserve special protection because of society's interest in the preservation of academic freedom).

[45] Fuch, *supra* note 43, at 433. The broad reach of academic freedom emphasizes the essentiality of university autonomy. The distinction between the individual's and the university's interest in academic freedom, however, may be ill-founded because, without a substantive degree of institutional autonomy, individual faculty members can hardly be expected to flourish in their chosen field of knowledge. *Id.*

[46] *Developments in the Law—Academic Freedom*, *supra* note 44, at 1047-49; *see* Note, *supra* note 42, at 1549-51 (university's contribution to social progress depends on atmosphere free of governmental influence).

[47] Murphy, *supra* note 44, at 453.

[48] 354 U.S. 234 (1957).

[49] Note, *Academic Freedom—Its Constitutional Content*, *supra* note 43, at 605-11.

Prior to the *Sweezy* decision, a constitutional right of academic freedom was first suggested in Adler v. Board of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting). In that case, the majority of the Court upheld a statute providing that teachers who advocated the overthrow of the government or held membership in organizations having such a purpose would be denied employment in public schools. *Id.* at 486. Justice Doug-

a professor who had refused to answer state-authorized interrogatories concerning his political beliefs and the contents of his classroom lectures.[50] The Court viewed the conviction as a direct invasion of the professor's right of academic freedom and political expression, and emphasized that governmental interference with the intellectual atmosphere of a university would be tolerated only for compelling reasons.[51] The majority opinion recognized that the right of students and teachers to inquire, to study, and to understand was paramount to a progressive civilization.[52] Although this case was primarily concerned with the individual's claim of academic freedom, Justice Frankfurter's concurrence referred to the institutional aspect of academic freedom by recognizing "four essential freedoms" of a university: "the right to determine for itself who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[53]

Another leading case involving claims of academic freedom was *Keyishian v. Board of Regents*,[54] where the Court continued to lend credence to the university's right of autonomy, in addition to reaffirming its recognition of the individual's right.[55] In *Keyishian* the Court invalidated a statute providing for the removal of teachers for treasonous or seditious utterances or acts,[56] reasoning that, because laws of this type tended to discourage the free exchange of knowledge and ideas, they could not be tolerated in an educational atmosphere.[57] In addition, the Court characterized academic freedom as a special interest of the first amendment because this freedom facilitates the pursuit

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las felt the statute should be invalidated because teachers, in fear of their jobs, would tend to steer away from any controversial organization. Consequently, the teacher's freedom of thought and expression would be chilled, academic freedom would be severely limited, and the exercise of free intellect would disappear. *Id.* at 508-11.

[50] 354 U.S. at 235-44.

[51] *Id.* at 250.

[52] *Id.* Disagreement as to whether the case involved first amendment or due process violations resulted in two concurring opinions by six members of the Court. Chief Justice Warren, joined by Justices Black, Douglas, and Brennan, decided for petitioner on due process grounds. *Id.* at 254-55. Justices Frankfurter and Harlan felt the case involved violations of the first amendment. *Id.* at 261-67 (Frankfurter, J., concurring).

[53] *Id.* at 262.

[54] 385 U.S. 589 (1967).

[55] *Id.* at 603. The Court noted that there was a national interest in protecting academic freedom because it is "of transcendent value to all of us and not merely to the teacher concerned." *Id.; cf. Note, Academic Freedom and Federal Regulation of University Hiring, supra* note 43, at 897 (government activity infringing on educational institutions is subject to high level of scrutiny).

[56] 385 U.S. at 603-04.

[57] *Id.* at 605.

and advancement of intellectual discoveries.[58]

The lead opinion of Justice Powell in *Regents of University of California v. Bakke*[59] could reasonably be interpreted as recognizing a constitutional right of academic freedom for educational institutions.[60] In considering the constitutionality of a university's medical school admissions program, Justice Powell found the affirmative action program to be inherently suspect, but possibly justifiable in the face of a substantial state interest.[61] Citing the "four essential freedoms" enumerated by Justice Frankfurter in *Sweezy*,[62] Justice Powell, in affirming the university's right to make its own educational decisions, noted that the first amendment protected the university's right of academic freedom, which included the right to decide who should be admitted to study.[63] The Court found, however, that the admission process violated the equal protection clause and that the state's interest in university autonomy was not substantial enough to justify such an intrusion upon an individual's constitutional rights.[64]

Lower federal courts, following the Supreme Court's lead, have endorsed the institutional aspect of academic freedom by limiting judicial intervention in university decisions.[65] In *Faro v. New York University*,[66] a professor whose employment was terminated at a state university sought an injunction compelling reinstatement.[67] Denying the in-

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[58] *Id.* at 603.

[59] 438 U.S. 265 (1978).

[60] Note, *Academic Freedom and Federal Regulation of University Hiring*, *supra* note 43, at 883.

[61] 438 U.S. at 305.

[62] *See supra* text accompanying note 53.

[63] 438 U.S. at 312.

[64] *Id.* at 320. Although the educational institution's right to academic freedom is important, this case points out this right is not absolute and can be overcome when there is proof of unconstitutional discrimination. *Id.*

[65] *See, e.g.*, Clark v. Whiting, 607 F.2d 634, 640 (4th Cir. 1979) (teacher's competence not an area for courts to "second guess" university judgments); Citron v. Jackson State Univ., 456 F. Supp. 3, 14 (S.D. Miss. 1977) (same); United States v. University of Md., 438 F. Supp. 742, 756 (D. Md. 1977) (federal courts are loathe to intrude into internal school affairs); Cussler v. University of Md., 430 F. Supp. 602, 605-06 (D. Md. 1977) (academic promotion decisions involve educator's professional judgments, which courts are reluctant to question); EEOC v. Tufts Inst. of Learning, 421 F. Supp. 152, 158 (D. Mass. 1975) (employment procedures established by a university are controlling); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976) (judiciary will not sit as a tenure review committee); Lewis v. Chicago State College, 299 F. Supp. 1357, 1359-60 (N.D. Ill. 1969) (judiciary not the appropriate forum to question university decisions).

[66] 502 F.2d 1229 (2d Cir. 1974).

[67] The professor alleged that the adverse employment decision resulted from uncon-

junction, the Second Circuit Court of Appeals held it was inappropriate to subject the university to federal court supervision since university employment decisions occupied an area of academic freedom that federal courts were hesitant to invade.[68]

A similar case is *Kunda v. Muhlenberg College*,[69] in which the Third Circuit Court of Appeals stressed the importance of an autonomous university, especially in its methods of selecting teachers.[70] Emphasizing that faculty employment determinations are best made by an applicant's peers, the court stressed that judicial intervention would not be permitted unless such determinations were proved to be vehicles for discrimination.[71] Observing that the university's right of academic freedom served to promote its role in effective implementation of social progress,[72] the court concluded that the very essence of the educational process depended upon the protection of this right.[73]

In *Gray v. Board of Higher Education*,[74] a case decided almost concurrently with the instant case, a federal district court in New York examined the concept of academic freedom as a basis for recognizing an evidentiary privilege pursuant to rule 501 of the Federal Rules of Evidence. The plaintiff filed suit against the university, its administrative officials, and several members of the tenure review committee, alleging that faculty reappointment with tenure was denied because of

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stitutional sexually discriminatory practices by the university. *Id.* at 1230.

[68] *Id.* at 1231-32.

In Green v. Board of Regents of Texas Tech. Univ., 335 F. Supp. 249 (N.D. Tex. 1971), the district court dismissed the plaintiff's claim alleging that a faculty promotion was denied because of sexual discriminatory practices by the university and held that the evidence established by the university clearly indicated that the plaintiff's promotion was denied for other than discriminatory reasons. *Id.* at 250. The court concluded that the proper authorities at a university are in the best position to make this type of judgmental determination, and the court should not interfere with the rationale of the decision absent malice, abuse of discretion, or unconstitutional discriminatory conduct. *Id.* at 251.

[69] 621 F.2d 532 (3d Cir. 1980).

[70] *Id.* at 548; *accord* Cooper v. Ross, 472 F. Supp. 802, 809 (E.D. Ark. 1979) (state university has the unquestioned right to select its faculty and evaluate their performances).

[71] 621 F.2d at 548; *see also* Johnson v. University of Pittsburg, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977) (peer review system is the most reliable method for assuring promotion of the best qualified teachers).

[72] 621 F.2d at 547. The court observed that the nation's future depended on scholars and researchers and that "the validity of their product will be directly proportionate to the stimulation provided by an unfettered thought process." *Id.*

[73] *Id.*

[74] 7 LAB. REL. REP. (BNA) (27 Fair Empl. Prac. Cas.) 256 (S.D.N.Y. Nov. 9, 1981).

unconstitutional racial discrimination.[75] The plaintiff sought to discover the votes of two faculty members on the tenure review committee.[76] The faculty members refused to respond to the plaintiff's request and urged the court to protect the university's interest in confidential employment records by recognizing, under rule 501, an evidentiary privilege based on academic freedom.[77] In determining whether the discovery request should be upheld or whether the confidentiality of the tenure votes should be protected by establishing a privilege, the court balanced the litigant's right of discovery, stemming from the public interest in full disclosure of all relevant factors, against the societal interest in protecting certain communications made within the context of confidential relationships.[78] In examining the privilege claim asserted by the faculty members, the court considered various factors, including whether the desired information was available from other sources, the degree of possible harm caused by disclosure, how relevant and compelling the desired information was to the party seeking disclosure, and the type of controversy before the court.[79] The court emphasized that confidential tenure selection methods were an integral part of a university's right of academic freedom and noted that confidentiality in personnel decisions was necessary in order adequately to ensure candid and frank evaluations from the review board.[80] Further-

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[75] *Id.* at 257.

[76] *Id.*

[77] *Id.* As an alternative to recognizing a privilege under rule 501, the faculty members asked the court to use its discretion to limit discovery under FED. R. CIV. P. 26(c). 7 LAB. REL. REP. (BNA) at 259. One commentator has argued that rule 26(c) is not a satisfactory method of protecting confidential employment decisions because it places too much discretion in the trial judge. The commentator contends that rule 26(c) was designed to eliminate bad faith in discovery requests and that using this rule to examine privilege claims therefore contravenes the entire purpose of FED. R. EVID. 501. Note *supra* note 42, at 1544.

[78] 7 LAB. REL. REP. (BNA) at 258; *see also* Mize v. McGraw-Hill, Inc., 86 F.R.D. 1, 2-4 (S.D. Tex. 1980) (courts balance competing interests in view of facts of case to determine if disclosure is justified); Lora v. Board of Educ., 74 F.R.D. 565, 577 (E.D.N.Y. 1977) (balance of competing interests is necessary to determine whether privilege will be recognized); Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 389 (N.D. Cal. 1976) (court balanced the private interest of the litigant seeking information against the effects of disclosure); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 83 (E.D.N.Y. 1975) (privilege claim should be judged on its facts by striking a proper balance between the competing interests).

[79] 7 LAB. REL. REP. (BNA) at 259; *accord* United States v. King, 73 F.R.D. 103, 105 (E.D.N.Y. 1976) (same factors considered in developing new privilege under rule 501), *aff'd*, 563 F.2d 559 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978).

[80] 7 LAB. REL. REP. (BNA) at 260.

more, preserving the element of confidentiality in the teacher review process served to promote the effectiveness of the peer review system, thereby resulting in better qualified teachers for the university.[81] Concluding that the university's interest in confidential employment information was substantial,[82] the court examined the possible benefit the plaintiff might gain by compelling disclosure of the faculty member's votes.[83] The court questioned the plaintiff's interest in specifically knowing which faculty member voted for or against the plaintiff's tenure application and found that the individual ballots would hardly supply any evidence to support a claim of unconstitutional discrimination.[84] Finding that the university's interest in confidential employment decisions decisively outweighed the plaintiff's interest in disclosing the faculty member's individual votes, the court concluded that since the university's right of academic freedom encompassed the necessity for confidential tenure review proceedings, a qualified evidentiary privilege was necessary to protect this information from disclosure.[85]

In the instant case, the court[86] noted that privileges were premised upon the idea that certain societal values rose above the search for truth. Since establishing new privileges, such as academic freedom, creates an exception to the public's right to evidence, privileges must be neither lightly created nor broadly construed.[87] Since the plaintiff was seeking to enforce constitutional and statutory rights in an employment situation and since the promotion was allegedly denied on other than academic grounds, the limits of academic freedom were clearly overshadowed by a national public policy prohibiting discriminatory

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[81] *Id.* at 262.

[82] *Id.* at 261.

[83] *Id.* at 260-61.

[84] *Id.* The court observed that the ballots themselves would not clarify the motivation, proper or improper, behind any individual faculty member's vote. *Id.* at 260. The court noted that the secret ballot is essential to any voting process that "is to be free of influence and pressure." *Id.* at 261. Although those voting on tenure decisions are not concerned about reprisal, maintaining secrecy is still valuable in order to prevent divisiveness among faculty members and to ensure that no one person exerts a disproportionate impact on the decision in question. *Id.*

[85] *Id.* at 261-62; *cf.* McKillop v. Regents of Univ. of Cal., 386 F. Supp. 1270, 1277-78 (N.D. Cal. 1975) (university protected from disclosing tenure evaluations by state-created privilege of official information).

[86] The case was heard by Judges Simpson, Roney, and Clark, with Judge Clark writing the opinion of the court.

[87] *In re* Dinnan, 661 F.2d at 428-30.

employment practices at state universities.[88] The court concluded that since the case involved not constitutional dimensions, but only the law of evidence,[89] and since the matters sought in discovery were relevant to plaintiff's claim, the need for truth prevailed over the need for the creation of an evidentiary privilege, that would allow faculty members the unparalleled right to grant or to deny an applicant's promotion without disclosing any reason for their action.[90]

It appears that the court in the instant case neither gave adequate consideration to the flexibility of rule 501 nor gave adequate protection to the interests of academic freedom. Both the legislative history of rule 501[91] and the Supreme Court's decision in *Trammel*[92] indicate that courts are to approach new privilege claims with flexibility. The instant case gives deference to the truth-seeking process without giving adequate consideration to the interests of academic autonomy. By so doing, the court raised a strong presumption against any claim of privilege based on academic freedom, thus, violating the statutory mandate to examine privilege claims on a case-by-case basis.[93] This case appears to be a return to a pre-rule 501 analysis, where a presumption existed against any privilege claim that was not traditional.[94]

The court also failed to recognize the fact that the historical development of academic freedom as a constitutionally-based right indicates a trend toward expansion, rather than limitation, of this freedom.[95] The court dismissed, perhaps, too easily, the defendant's claim that issues of constitutional dimensions were involved, without giving due consideration to the importance of institutional autonomy in the academic context.

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[88] *Id.* at 431.

[89] *Id.* at 427.

[90] *Id.* at 429-33. The defendant also claimed that the information was protected by a "secret ballot" privilege. In rejecting this claim, the court reasoned that considerations giving rise to the privilege in the context of political and labor elections were not present here. The court found no great societal interest in this type of vote, as opposed to political and labor elections. In addition, the court found the likelihood of retaliation against the voter if his vote was known to be small. The court concluded that voters in tenure elections must not be timid but must be responsible enough to acknowledge their decisions. *Id.* at 431-32.

[91] *See supra* notes 28-31 and accompanying text.

[92] *See supra* notes 36-39 and accompanying text.

[93] *Cf.* Ryan v. Commissioner, 568 F.2d 531, 543 (7th Cir. 1977) (congressional intent was for privileges to be determined on a case-by-case basis), *cert. denied*, 439 U.S. 820 (1978).

[94] *See supra* note 16 and accompanying text.

[95] *See supra* notes 43-73 and accompanying text (discussing historical development of academic freedom).

The court should have analyzed the defendant's privilege claim in a manner similar to that used in *Gray*.[96] Specifically, the court should have considered whether the desired information was available from other sources, whether the information sought was essential to the plaintiff's discrimination claim, and whether any adverse effects would result from compelling the defendant to disclose his vote. In addition, before upholding the plaintiff's discovery motion, the court should have inquired into the procedures used in the nonrenewal decision, any statistical evidence that might give rise to an inference of discrimination, and any circumstances that might indicate personal bias or prejudice of individual members of the review committee.[97]

In the instant case, the court should have placed more importance upon the university's interest in maintaining confidentiality in tenure review decisions as necessary to its right of academic freedom. As noted in *Gray*, protecting such information furthers the public interest of preserving the quality and autonomy of universities in their hiring procedures.[98] Furthermore, the court in *Gray* correctly observed that compelling disclosure of confidential employment information tends to result in less candid evaluations, thereby eroding the effectiveness of the peer review system.[99]

By failing to consider any relevant common law factors, such as those enumerated in *Gray*, and by simultaneously overlooking the importance of confidentiality in the tenure review process, the court in the instant case strayed from the method of analysis contemplated by rule 501 in examining new privilege claims. As recognized by the court in *Gray*, either the institution's constitutional right of academic freedom or the principles of common law should provide for the recognition of a qualified evidentiary privilege to shield confidential employment information from judicial inquiry.[100] Once this privilege is recognized, a court should balance the litigants' respective interest in disclosure and nondisclosure to determine whether the privilege should yield to the all-important search for truth.[101]

Sally A. Atkinson

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[96] *See supra* notes 74-85 and accompanying text (analyzing *Gray*).

[97] *See* Note, *supra* note 42, at 1564 (court should look at plaintiff's case to determine whether individual tenure vote is relevant).

[98] 7 LAB. REL. REP. (BNA) at 260-62.

[99] *Id.*

[100] *Id.* at 261-62.

[101] *Id.*

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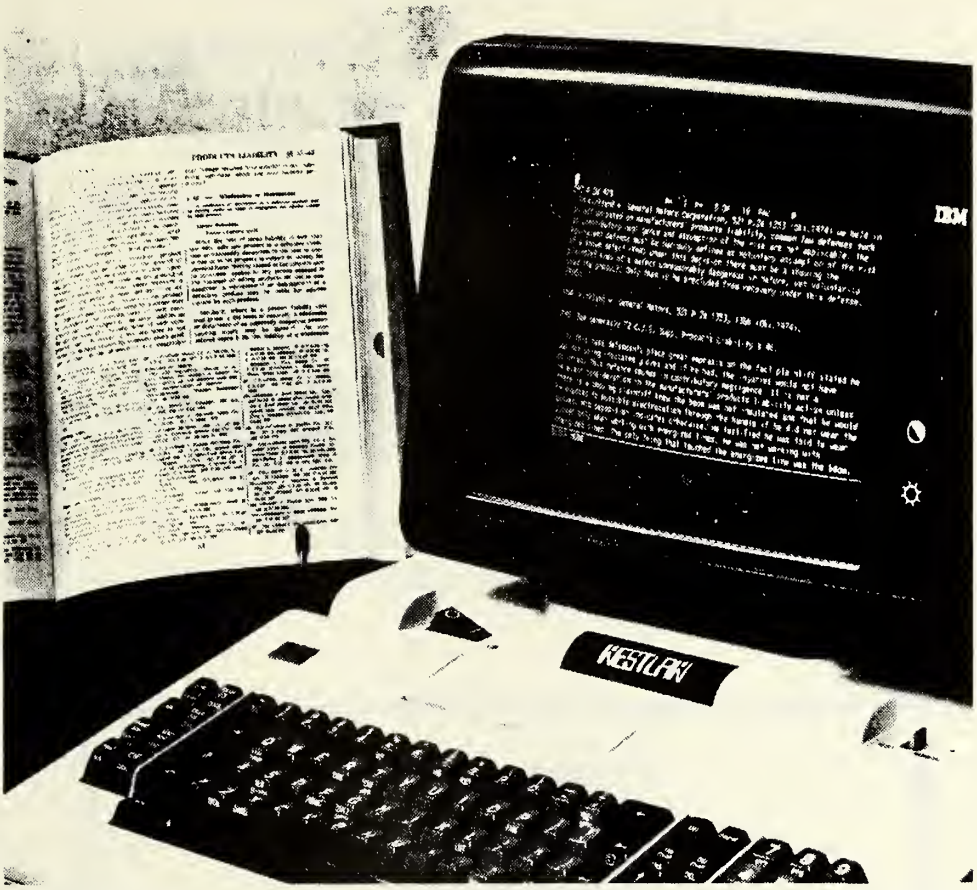

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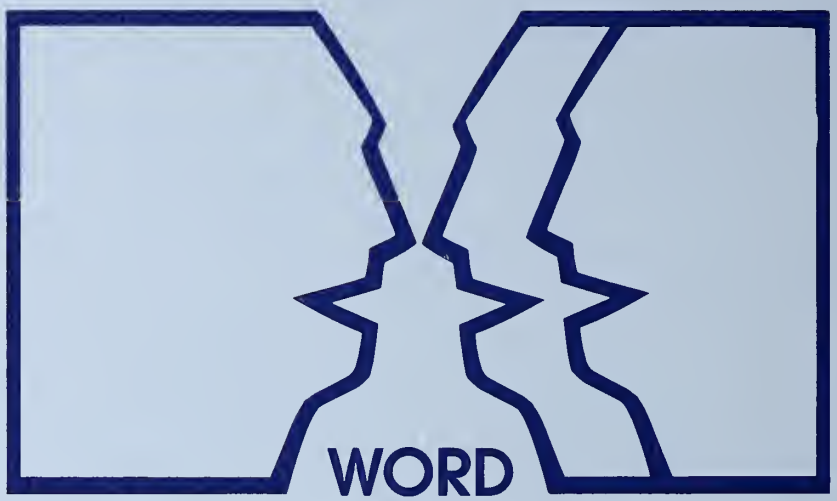

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